Petition

81-1931

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MEMORIAL PARK CEMETERY ASSOCIATION, a corporation; VALHALLA CEMETERY, CREMATORY AND MAUSOLEUM CO., a corporation; LAKE CHARLES MEMORIAL PARK, INC., a corporation; ALEXANDER & SONS, INC., a corporation; d/b/a MT. LEBANON CEMETERY AND MAUSOLEUM; LAKEWOOD PARK CEMETERY, INC., a corporation; SUNSET BURIAL PARK, INC., a corporation; STANZA & COMPANY, INC., a corporation; d/b/a OAKGROVE CEMETERY; LAUREL HILL MEMORIAL GARDENS, INC., a corporation; MASON SECURITIES COMPANY, d/b/a HIRAM CEMETERY; MT. HOPE CEMETERY AND MAUSOLEUM COMPANY, a corporation; SOUTHERN SECURITIES COMPANY, a corporation, d/b/a PARK LAWN CEMETERY,

Petitioners,

v.

ROSEBROUGH MONUMENT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is it a "tying" arrangement in violation of the Sherman Act for a cemetery to maintain a policy whereby it reserves the right to dig memorial foundations and set memorials in all burial plots sold in the cemetery when (a) customers are free to purchase memorials from any source and (b) the cemetery has a statutory obligation to maintain the memorials in perpetuity?

2. Did the Court of Appeals disregard controlling precedent of this Court by ignoring the fact that there was no separate market for, and no interstate commerce in, the so-called "tied" product (memorial foundations) and by focusing instead on commerce in a market for a product (memorials) which was neither the tying nor the tied product?

3. Did the Court of Appeals violate Rule 52(a) by retrying the "conspiracy" issue *de novo* and reaching a finding contrary to that of the district court on the basis of routine, typical trade association activities?

PARTIES TO THE PROCEEDING

Petitioners, listed fully in the caption, are elevent privately owned cemeteries in the St. Louis, Missouri area. Respondent is a privately owned St. Louis monument dealer.

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OPINIONS BELOW

The Judgment of the District is Appendix A hereto The Findings of Fact and Conclusions of Law of the District Court in favor of Petitioners were reported as *Rosebrough Monument Company* v. *Memorial Park Cemetery Association,* 505 F.Supp. 525 (E.D.Mo. 1980), and are reproduced in full in Appendix B hereto.

On December 9, 1981 the Eighth Circuit Court of Appeals affirmed in part, reversed in part, and remanded the case with directions to the District Court to enter an injunction against Petitioners. The opinion of the Court of Appeals has been reported. *Rosebrough Monument Company* v. *Memorial Park Cemetery Association,* 666 F.2d 1130 (8th Cir. 1981). The opinion and judgment of the Court of Appeals are reproduced in Appendix C hereto. The order of the court denying rehearing and rehearing en banc is Appendix D.

STATEMENT OF JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit were entered Decmeber 9, 1981. Petitioners' timely petitions for rehearing and suggestions for rehearing en banc were denied February 9, 1982. Jurisdiction of this Court is conferred by 28 U.S.C. §1254.

STATUTES INVOLVED

The statute involved in this case is §1 of the Sherman Act, 15 U.S.C. §1:

> §1. Trusts, etc., in restraint of trade illegal; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
>
> As amended Dec. 21, 1974, Pub.L. 93-528, §3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, §2, 89 Stat. 801.

STATEMENT OF THE CASE

Petitioners are eleven of the fifty fully endowed cemeteries located and operating in the City of St. Louis and the adjoining County of St. Louis. These cemeteries are operated by corporations and by religious and other groups. The purchaser of a grave space in one of these cemeteries buys a bundle of rights, which includes the right to be buried in the cemetery ("interment"), the right to have a monument or marker ("memorial") placed on the grave space, and the right to perpetual care by the cemetery. The cemetery retains the fee interest in its land.

Each of the fifty St. Louis cemeteries has a long-established rule or practice which provides that the cemetery will perform the interment services and the foundation preparation services for memorials installed in its own cemetery. (Tr. 953, Ex. 87-96.) Such a rule has been in effect in the cemeteries since their inception, in many instances going back to the early 1900's. Indeed the same cemetery practice is in effect in all well-run cemeteries operating in the United States.

Respondent Rosebrough Monument Company ("Rosebrough") is a monument dealer which buys and sells memorials in the St. Louis Metropolitan area. (Tr. 292.) Rosebrough and about five other St. Louis monument dealers sell memorials to lot owners in all of the St. Louis cemeteries, including Petitioners'. (Tr. 897.) After the monument dealer sells a memorial, the dealer requests the cemetery to prepare a foundation for the memorial to be placed in the particular cemetery. The cemetery's employees then locate the correct grave space and prepare the foundation. The memorial is then delivered by the monument dealer and is set on the completed foundation. (Tr. 814-845.)

Each of the Petitioners competes with Rosebrough and the other St. Louis monument dealers for memorial business in the Petitioner's own cemetery. (Pretrial Stipulation, Schedule C.)

Rosebrough brought this civil antitrust action against the Petitioners in the United States District Court for the Eastern District of Missouri seeking injunctive relief and treble damages. Jurisdiction was based upon §4 of the Clayton Act, 15 U.S.C. §15. The complaint charged that each cemetery had a policy which permitted only employes of the cemetery to install foundations for memorials on its property, and that this policy constituted a tie-in in violation of §1 of the Sherman Act, 15 U.S.C. §1. Rosebrough also claimed that the defendants had conspired to establish and maintain this policy.

THE EVIDENCE AT TRIAL

It was admitted that each cemetery had a policy which permitted only employees of that cemetery to dig and pour foundations. Rosebrough attacked Petitioners' charges for this foundation service as being too high. It indicated that it could perform these services for less. Indeed it proferred a proposal to perform this work at cost and without profit but only incidental to its own memorial sales. (Tr. 79-81, 437.) (The District Court found as a fact that defendants' cemetery foundation charges were "competitive and reasonble" and that Rosebrough's "incredible estimates and promises" were "meaningless." 505 F.Supp. at 528, Appendix at A-7.[1])

Defendants' evidence demonstrated that each cemetery sold only a bundle of rights — the right to burial at a grave site, the right to have a memorial placed on that site, and the right to perpetual care. The evidence showed that in selling these services each cemetery undertook an obligation to insure that the site be well-kept and maintained, and that an attractive and tranquil environment of the entire cemetery be preserved. The defendants' evidence showed that to insure performance of its

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[1] All citations to the opinion below are to both the official reports and the Appendix to this Petition, where the text of the opinions is set out in full.

continuing obligation, the cemetery must perform the services it sells, including the preparation of foundations in its own cemetery.

Defendants adduced evidence as to exactly what was involved in the preparation of memorial foundations. (Tr. 814-845.) The first step is the proper location of the grave space and the layout of exactly where the foundation is to be placed. (Tr. 824.) This involves a cemetery employee familiar with the cemetery locating the corner posts of the particular lot (which are normally below the surface of the ground), determining the grave space within the lot and laying out the foundation bounaries. Next the work must be scheduled to avoid conflict with funerals being conducted in the cemetery. (Tr. 1242-1251.) The cemetery crew arranges for its equipment and material to be brought to the site. The foundation is dug either by hand or by backhoe. The earth is removed and loaded into a cart, which has special tires to avoid damaging the lawn, and is transported to another part of the cemetery and unloaded. The hole is then filled either with gravel or ready-mixed concrete. The memorial is then inspected and checked for accuracy, and placed on a granite or concrete base and on the foundation.

There was evidence that, should outside parties attempt to perform foundation services, there would be a duplication of costs to the consumer. Services of cemetery employees would still be required to locate and outline the grave space.[2] (See, e.g., Tr. 1002-1006.) In addition, defendants' witnesses testified that to insure the quality of the foundation (and minimize the inevitable post-installation problems) their supervision would be required to assure that the work would be performed properly. (Tr. 1007-1009.) Thus there would be a duplication of employees doing and supervising the work.

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[2] These are large cemeteries with numerous and many times odd shaped lots which were laid out many years ago. Defendants' witnesses testified that an experienced person with knowledge of that particular cemetery was necessary to perform this work.

Defendants' witnesses testified that the divided responsibility in the preparation of foundations would lead to disputes over the responsibility for subsequent adjustments or repairs. In some cemeteries, the process of resetting memorials goes on constantly as part of the cemeteries' perpetual care obligation. (Tr. 989-990.) If it were necessary to assess responsibility for the failure in each such case, the result would be an impairment in the cemetery environment, an increased cost, or both.

A practical aspect of Rosebrough's proposal to have its employees do this work was the fact that the employees of the cemeteries and the employees of Rosebrough belonged to different trade unions. This would inevitably lead to disputes over jurisdiction in the supervision and execution of the work.

Defendants' expert economist testified that the cemeteries sold an environment constituting only one product (Tr. 1329); that Defendants neither alone nor in a group had sufficient market power to control prices or exclude competition (Tr. 1319); that the cemetery practice was justified by quality control considerations; and that there was no viable alternative to the cemeteries doing this work themselves.

THE DISTRICT COURT FINDINGS

The District Court found the disputed facts in favor of defendants. The court found that providing foundation services was a necessary part of the business of selling cemetery lots and that sale of the lot and the foundation service was but one product; that the defendants did not possess sufficient economic power in the claimed "tying" market — grave sites — to restrain competition; that the activity in question was purely local in character and did not effect a "not insubstantial" amount of interstate commerce; and that the challenged practice "was and is justified." (505 F.Supp. at 529; App. at A-8.)

The District Court found that it is "reasonable for the cemetery to require that its employees perform the foundation services." The court acknowledged that "specifications could be prepared to describe the different foundation procedures of each cemetery" but that because of the problems inherent in third party installation, this was a "burdensome alternative." The court (505 F.Supp. 529, 530; App. at A-9) enumerated those problems as divided accountability, scheduling, the duplication of services and that not all third party installers would be or remain responsible but that the cemetery remained responsible to the lot owner. It concluded that the implementation of such an alternative would place an unreasonable burden on the cemetery and in the long run the public would pay more.

The District Court also found that there was no conspiracy "regarding the price for foundation services or the adoption or maintanance of the Rule." Finally, the court found that plaintiff had failed to prove either the fact or the amount of damage.

THE COURT OF APPEALS' OPINION

The Court of Appeals reversed. *Rosebrough Monument Co.* v. *Memorial Park Cemetery Ass'n.*, 666 F.2d 1130 (8th Cir. 1981). It relied heavily on a Ninth Circuit opinion involving somewhat similar facts. *Moore* v. *Jas. H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977), finding after remand in favor of the *cemeteries* on the practice here involved, 1979-1 Trade Cases (CCH) ¶62,716 (D.Ore. 1979); appeals pending, Nos. 80-3180 and 80-3217 (9th Cir.). (The defendant cemeteries in *Moore*, unlike those here, required lot owners to buy memorials from the cemetery. On retrial, the District Court designated this as an illegal tie, while upholding the foundation services requirement as a legal practice.)

Disregarding the District Court's findings, the Eighth Circuit in the case at bar found the challenged practice to be a "*per se* tying arrangement" (666 F.2d at 1146; App. at A-39). The Court of Appeals "found" that the practice did not result in a

cost saving and the foundation service was "generically different" from the right of interment so that there were two products and thus a tying arrangment. Totalling the combined 22% market share of Petitionrs of the St. Louis cemetery market, the Court of Appeals found sufficient economic power to restrain competition. 666 F.2d at 1142-43, App. at A-32. It disregarded the fact that there was no interstate commerce in the claimed tied product — foundation services — but found interstate commerce by viewing the amount of commerce in *memorials*. 666 F.2d at 1143-1145, App. at A-34 to 37. Finally, the court rejected the District Court's findings of justification by ruling that specifications could be written to describe how to prepare a foundation for a memorial. In opted to impose an experiment on Petitioners (and all cemeteries), finding as a fact that the "adoption of quality guidelines in this instance would clearly be in the public interest." 666 F.2d at 1145; App. at A-38. At the same time the Eighth Circuit cautioned that it was not imposing "a policy of unlimited or unrestricted entry." Rather:

> "Our aim, as outlined above, is to afford concerns a reasonable opportunity to demonstrate the public advantages in increasing the number of firms that manufacture, prepare foundations, install and service grave markers and foundations." (666 F.2d at 1146; App. at A-39)

In addition and contrary to an explicit finding by the District Court that there was no "conspiracy," the Court of Appeals found that there was a conspiracy not only among Petitioners but among *all* St. Louis cemeteries. 666 F.2d at 1136-1140, App. at A-21 to 27. In its only compliance with the clearly erroneous rule, the Court of Appeals did not disturb the District Court's finding that plaintiff had failed to prove that it was damaged. 666 F.2d at 1146-47, App. at A-39-41. Nonetheless the court remanded the case with directions to the District Court to enter an injunction and to award plaintiff its attorneys' fees. 666 F.2d at 1147-48, App. at A-42-43. Following the denial of Petitioners' motion for rehearing, the Court of Appeals has stayed its mandate pending this Court's disposition of the case.

ARGUMENT

I. This Court Should Grant Certiorari To Decide The Proper Standards To Be Applied In Deciding A Tying Case.

In a case involving vertical location restrictions, this Court recognized the danger in making the antitrust legality of a business practice turn on formalistic line drawing rather than on the actual economic effect of the practice. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). A second area involving vertical restrictions where the use of labels rather than sound economic analysis has prevailed is the law of tie-ins. The law in this area is a jungle. As the Third Circuit has noted, "We are genuinely concerned that the law of tying is becoming a kind of semantic shell game, resting more on key words than on careful analysis." *Ungar* v. *Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1222 (3rd Cir. 1976), *cert. denied*, 429 U.S. 823 (1976).

This is just what has happened in the case at bar. The Court of Appeals disregarded the District Court's findings of fact and its reasoned analysis of the economic impact of the alternatives involved, and instead applied conclusional labels to determine that there was an unlawful tying arrangement. The District Court here followed a traditional approach. It made findings of fact based on the evidence including an economist's expert testimony. It weighed carefully the purposes and effects of the challenged business practice. In applying the law, the District Court followed the lead of Judge Aldisert in *Ungar, supra*, and viewed the "nature of the . . . industry and the effects which may be perceived to flow from the decision under review." 505 F.Supp. at 531, citing *Ungar* v. *Dunkin' Donuts of America, Inc., supra*, 531 F.2d at 1222.

The Court of Appeals imposed its own economic construction of the facts and employed its version of tying rules to find a tie. On the issue of product definition, the District Court had given particular emphasis to the services supplied by the

cemeteries as constituting one product. In reversing those findings, the Court of Appeals determined there were two products, stating baldly that "a cemetery lot and the preparation of the foundation" are "two generic products." 666 F.2d at 1142, App. at A-31. In doing so, the Court of Appeals (666 F.2d at 1141, App. at A-30) alluded to the business justifications for the practice which it says Petitioners "failed to show." The Court of Appeals paid lip service to the defense of justification but then ruled it inapplicable because it found, contrary to the District Court, that specifications would be more in the public interest. The Court of Appeals' opinion is typical of the misapplications of tying law which have prevailed in the absence of guidance from this Court. As we will show, its finding of two products and rejection of defendants' justifications are inconsistent with numerous decisions of other courts.

The "One Product-Two Products" Issue

A threshold question in every tying case is whether the defendant is selling only a single product, or two or more separate products. See *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 613 (1953). The consequences of a court's decision on this preliminary point are profound. If there is only one product, there can be no tie-in, and so no antitrust violation. If there are multiple products, the door is opened to potential *per se* liability.

This Court has never set out the standards to be considered on this "one-product two-product" issue. In *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 613 (1953), the Court found one product, but did not set out the standard which led to that conclusion. In *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 512-14 (1969) the Court expressly disclaimed an intent to fix a "one product" standard applicable beyond that case. This Court's other leading tie-in decisions, *Northern Pacific Railroad Co.* v. *United States,* 356

U.S. 1 (1958) and *International Salt Co.* v. *United States,* 323 U.S. 392 (1947), did not reach the one product-two product question.

The result of the lack of standards in this area is general confusion. "[T]here exists no definitive formula or listing of factors from which a court or merchant could conclude with any degree of confidence whether anti-tying doctrines are even applicable" to a particular business arrangement. *See* Ross, The Single Product Issue in Antitrust Tying, 23 Emory L.F. 963, 964 (1974). In this vacuum, courts and commentators have developed various tests to use on the "one-product" issue. Most use some combination of these tests in addressing the question. The Court of Appeals opinion here is an example of misapplication of virtually all the tests.

A first test, suggested by Professor Turner, is the "fixed proportion" test. Turner suggests that when products are typically sold in fixed proportions as a unit they should "prima facie" be treated as one product. Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv.L.Rev. 50, 72 (1958); *see,* e.g., *ILC Peripherals Leasing Corp.* v. *International Business Machines Corp.,* 448 F.Supp. 228, 232 (N.D.Cal. 1978) (applying this test as part of a "one product" finding). It is harder to imagine a clearer fixed proportion case than the case at bar: one grave site, one foundation. The Court of Appeals, although it cited the fixed proportion test, found "generically separate" products.

A second test is whether there is a separate market in the tied product (*see, e.g., Washington Gas Light Co.* v. *Virginia Electric and Power Co.,* 438 F.2d 248, 253 (4th Cir. 1971)). Here, there is no such separate market. No one sells "foundation installation services" as a separate product. Even Respondent does not propose to offer such a service; rather, it proposes to offer foundation services at cost as an incident to its sale of

memorials. The Court of Appeals found separate products despite the absence of such a separate market.

A third test sometimes used on the "one-product two-product" issue is how the goods are typically sold by others. A number of courts have found two products where the evidence shows that the two components are in fact sold separately by others in the market. *See, e.g., Siegel* v. *Chicken Delight,* 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 965 (1972); *N. W. Controls, Inc.* v. *Outboard Marine Corp.,* 333 F.Supp. 493, 503 (D.Del. 1971), later opinion 349 F.Supp. 1254 (D.Del. 1972). In the present case, the evidence showed the contrary: virtually every well-run cemetery in the St. Louis area and throughout the country has adopted the practice challenged here. Nonetheless, the Court of Appeals (in a demonstration of the *Catch-22* nature of this area of the law) found separate products. It apparently considered this unity of practice to be evidence of a "conspiracy." Under the Court of Appeals' view, then, if other traders sell the two components separately, this proves they are separate products, therefore a tie-in exists. If other traders do not sell the two components separately, this evidences a conspiracy to maintain a uniform practice, and thus establishes liability.

The problems generated by these first three tests pale in comparison to the confusion created by a fourth factor that has been considered on the "one product-two product" question: the business justifications for joint sale of the two components. To demonstrate the problem that has arisen, we review the role of business justifications in the tie-in area.

The Role Of Business Justifications

Tying arrangements, since they were first condemned as *per se* violations in *International Salt Co.* v. *United States,* 332 U.S. 392 (1947); and *Standard Oil Co.* v. *United States,* 337 U.S. 293

(1949), have been an unusual kind of per se violation. A violation is condemned as *per se* because it is almost always without justification. Judicial economy permits the prohibition of all instances of the condemned practice because justifications for it are so few as not to be worth the judicial effort involved in identifying them. See *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1 (1958); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36 (1977). A *per se* violation in antitrust is irrebutably an unreasonable restraint of trade. *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940).

Tie-ins are different, both in econimics and in law. There are many reasons, apart from the artificial foreclosure of a market in a "tied" product, why a seller combines two components and sells them only as a single unit. Such a practice might serve the seller's goodwill interests, by insuring the satisfactory performance of the tying product. It might effect cost savings. *See* Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv.L.Rev. 50 (1958).[3]

In its early cases condemning tying arrangements, this Court recognized that in some limited circumstances tie-ins, unlike other "per se" violations, can be justified. In dicta in *Standard Oil Co.* v. *United States,* 337 U.S. 293 (1949) (a requirements contract case) the Court suggested that tie-ins could be justified, but only where necessary to protect the goodwill of the seller and where specifications could not practicably be supplied. 337 U.S. at 306. The result of this narrow *Standard Oil* language is a

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[3] Other commentators have suggested a host of benign purposes arguably served by tying arrangements. *See,* Note, Product Separability: A Workable Standard to Identify Tie-In Arrangements Under the Antitrust Laws, 46 So. Cal. L.Rev. 160, 164 (1972); Pearson, Tying Arrangements and Antitrust Policy, 60 Nw. U.L.Rev. 626, 647 (1965); Ross, The Single Product Issue in Antitrust Tying, 23 Emory L. J. 963, 966, n. 22 (1974).

series of lower court decisions rejecting justification defenses. *See, e.g., Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971) *cert. denied.* 405 U.S. 965 (1972); *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 415 F.2d 55 (4th Cir. 1969). In virtually every case, specifications can be imagined that would in theory protect the seller's goodwill. Tie-ins expressly found lawful under the *Standard Oil* justification defense are therefore few indeed. See *In re Data General Corp. Antitrust Litigation,* 490 F.Supp. 1089, 1120 (N.D.Cal. 1980). Thus, many courts - like the Court of Appeals here - virtually exclude considerations of business justification in tying cases.

Other courts follow a different line. In making the threshold "one product-two product" determination, they examine the business justifications for selling two components together. If the joint sales serve legitimate business purposes of the seller and/or the buyer, only one product and no tie has been found. In this way the considerations of business justification ostensibly eliminated from tying cases by *Standard Oil Co.* v. *United States, supra,* have in fact found a place in the law of tying.

An early case taking this approach was *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F.2d 653 (1st Cir. 1961). The defendant sold its patented unloader only to purchasers of silos of its own manufacture. Obviously, the silo and the unloader could have been sold separately. Nonetheless, because the joint sale served quality control and good will purposes, the First Circuit found one product and affirmed a directed verdict for the defendant.

In *Principe* v. *McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980), *cert. denied,* 451 U.S. 970 (1981), the products involved were the "McDonald's" trademark, the lease of a restaurant building, and a loan of money. A McDonald's franchisee could use the trademark only in a building being leased from McDonald's Corporation. Obviously, in theory the trademark

could be licensed for use in a building separately acquired by the franchisee. However, the Fourth Circuit concluded that because the building and the trademark were "integral components of the business method being franchised" (631 F.2d at 309) and the joint sale served the interests of the franchisor and franchisee, there were no separate products, and thus no tie-in.

In *Foster* v. *Maryland State Savings & Loan Assoc.*, 590 F.2d 928 (D.C. Cir. 1978), *cert. denied,* 439 U.S. 1071 (1979), a lender required that a borrower pay attorney fees of the lender's counsel in connection with a residential loan. Obviously, the money could be loaned and lawyers hired separately. Nonetheless, the court found there was but one product, because the lender's right to choose its lawyer and require the borrower to pay was motivated by the legitimate business concern of insuring the security of its loans. *See also Forest* v. *Capital Bldg. & Loan Assoc.*, 385 F.Supp. 831 (M.D.La. 1973), *aff'd* 504 F.2d 891 (5th Cir. 1974), *cert denied* 421 U.S. 978 (1975).

An Arizona federal court, in *Hirsh* v. *Martindale-Hubell, Inc.*, 505 F.Supp. 114 (D.Ariz. 1981), has held that Martindale-Hubbell does not sell separate products when it requires that lawyers who wish to advertise in its directory buy the directory. The court found that the requirement to buy a directory along with the advertising was not a tie-in, because both the directory and the advertising served a single purpose—"to place information regarding attorneys in an accessible format" — and so were a single product. *Hirsh* v. *Martindale-Hubbell, Inc., supra,* 505 F.Supp. at 117 n. 8.[4]

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[4] Other lower court decisions which have given weight to business justifications in the tie-in context include *United States* v. *Jerrold Electronics Corporation,* 187 F.Supp. 545 (E.D.Pa. 1960), affirmed *per curiam* 365 U.S. 567 (1961); *Response of Carolina, Inc.* v. *Leasco Response, Inc.,* 537 F.2d 1307 (5th Cir. 1976); *Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.,* 549 F.2d 368, 379 (5th Cir. 1977); *Kugler* v. *AAMCOP Automatic Transmissions, Inc.,* 460

In the present case, as in those just cited, the joint sale of two components—here the right to burial and the installation of a foundation—serves legitimate purposes of the cemeteries and the consumer. It saves money. It insures the continued quality of the cemetery environment. It avoids scheduling difficulties. The District Court, which heard the evidence justifying the defendants' practice, found these to be facts. It concluded that the business justifications here substantiated a one-product finding.[5] The Court of Appeals found otherwise. It purported to consider justification on the one product-two product issue, but interpreted the concept very narrowly, as equivalent to the "justification" affirmative defense. The Court of Appeals in fact suggests that the *only* business justification which would warrant a one-product finding is a cost savings. (See 666 F.2d at 1141, App. at A-30). This is clearly contrary to *Dehydrating Process Co.* v. *A. O. Smith Corp.; Principe* v. *McDonald's Corp., Foster* v. *Maryland State Savings & Loan Assoc.,* and *Hirsch* v. *Martindale Hubbell,* cited above, all of which involved justifications other than cost savings. It is contrary also to the trial court's finding in this case that cost savings do result from the challenged practice.

F.2d 1214 (8th Cir. 1972), and *In re 7-Eleven Franchise Antitrust Litigation,* 1974-2 Trade Cases (CCH) ¶75,429 (N.D.Cal. 1974). These lower court decisions are like those cited in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36, 48 n. 14 (1977): a struggle to distinguish or limit prior tying cases "in ways that are a tribute to judicial ingenuity."

[5] Interestingly, in the Nineth Circuit *Moore* litigation, the District Court after hearing the evidence about how the cemetery industry is operated also found one product, and justification. *Moore* v. *Jas. H. Matthews & Co.,* 1979-1 Trade Class (CCH), ¶62,716 (D.Ore. 1979). Trial in that case followed an earlier Ninth Circuit opinion (on appeal from a judgment for the defendant) which remanded for further proceedings. *Moore* v. *Jas. H. Matthews & Co.,* 550 F.2d 1207 (9th Cir. 1977). The District Court's ultimate finding for the defendant on the foundation services tie-in claim is now under submission in the Ninth Circuit. *Moore* v. *Jas. H. Matthews & Co.,* Nos. 80-3180 and 80-3217.

The lower federal courts are badly in need of guidance in determining what is one product and when business justification will defeat liability in a tie-in situation. There is no reasoned basis by which the practices in *Dehydrating Process Co., Principe, Foster,* and *Hirsch* can be legitimate business activities and the practice here an unlawful tie-in. There is a basic inequity in finding some alleged tie-ins lawful because of business justifications, yet invalidating others which are, if anything, more reasonable. This Court should settle the criteria for determining whether there are one or two products and the meaning of the defense of justification in tying cases. One alternative would be to follow the approach taken in *Continental T.V., Inc.* v. *GTE Sylvania, inc., supra,* and adopt a rule permitting at least some practices formerly held to be *per se* unlawful to be adjudged by a rule of reason standard. Cutting across the issues here is the proper role of the fact finder - in this case the District Court - in deciding such a case and the proper role of the Court of Appeals in reviewing such a case on appeal.

The present case shows how far a court can go wrong in the tying area. It involves a question of substantial importance to the public and to the cemetery industry. It also is a case presenting tying issues which cry out for clarification. It is an ideal case for the exercise of this Court's certiorari jurisdiction.

II. The Court Should Grant Certiorari Because The Court Of Appeals Departed From This Court's Prior Decisions Requiring The Foreclosure Of Interstate Commerce In The Tied Product As An Essential Element Of A Per Se Tie-In Violation.

A substantive element of a per se tie-in arrangement is that the challenged arrangement affect a "not insubstantial" amount of interstate commerce. *Northern Pacific Railway Company* v. *United States,* 356 U.S. 1, 6 (1958). "A not insubstantial amount of interstate commerce in the tied market"

must be foreclosed if an unlawful tie-in is to be found. *See e.g., Chatham Condominium Association* v. *Century Village, Inc.*, 597. F.2d 1002, 1008 n. 8 (5th Cir. 1979); *Driskill* v. *Dallas Cowboys Football Club, Inc.*, 498 F.2d 321, 323 (5th Cir. 1974); *Coniglio* v. *Highwood Services, Inc.*, 495 F.2d 1286 (2nd Cir. 1974).

In the tie-in cases where this Court either found or suggested *per se* violations, the tied product itself moved or was traded in interstate commerce. In *Fortner Enterprises* v. *U.S. Steel Corp.*, 394 U.S. 495 (1969), the tie-in arrangement allegedly foreclosed the sales of prefabricated houses "throughout the country". 394 U.S. at 502. In *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1 (1958), the tied produce was transportation services on an interstate railroad. In *International Salt Co.* v. *United States,* 332, U.S. 392 (1947), the tied product, salt, was itself sold in interstate commerce. 332 U.S. at 394. In each case, the strength of the tying product was allegedly used to exclude competitors from an interstate market in the tied product, and this exclusion resulted in a Sherman Act violation.

In the present case, in contrast, both the "tying" product — the right to interment in a grave site — and the "tied" product — the installation of a foundation on the site — are purely local in character. [Compare *Lawson* v. *Woodmere,* 217 F.2d 148 (4th Cir. 1954); *John Kalin Funeral Home, Inc.* v. *Fultz,* 313 F.Supp. 435 (W.D. Wash. 1970), *cert. den.*, 404 U.S. 881 (1971)]. There is no separate market, much less an interstate market, in the installation of foundations for monuments and markers. No interstate commerce has been foreclosed.

It is this element, market foreclosure in interstate commerce, which makes a tie-in a *per se* violation. In discussing the "not insubstantial amount of commerce" test in *Fortner I,* the Court said:

> "But normally the controlling consideration is simply whether a total amount of business, substantial enough in

> terms of dollar-volume so as not to be merely *de minimis,* is foreclosed to competitors by the tie, for as we said in *International Salt, it is unreasonable, per se, to foreclose competitors from any substantial market by a tying arrangment,* 332 U.S. at 396, 92 L.Ed. at 26."

Fortner Enterprises v. *U.S. Steel Corp.,* 394 U.S. 495, 504 22 L.Ed. 2d 495, 89 S.Ct. 1252 (1969). (Emphasis supplied.)

When the Eighth Circuit attempted to determine the effect of defendants' policies in the present case, it did not look to the market in the tied product, that for foundation preparation services. Rather, it examined a separate market — that for memorials. The court found that memorials worth over one million dollars were purchased outside the state of Missouri for placement in defendants' cemeteries. 666 F.2d at 1144; App. at A-36. This is obviously a "not insubstantial" amount of interstate commerce supposedly affected here. But these *memorial* sales were not foreclosed by the "tie." Rather, plaintiff competed vigorously with defendants for the sale of memorials and much of this one million dollars in memorial sales represent plaintiff's sales! This is not, in the language of *Fortner,* an amount "foreclosed to competitors by the tie." This crucial element required for a *per se* offense — foreclosure of a "not insubstantial" amount of interstate commerce in the tied product — in absent here.

The Court of Appeals erred on this point because it confused the market foreclosure required in a tie-in case with the much broader "affecting commerce" jurisdictional requirement of the Sherman Act. It relied heavily on *McLain* v. *Real Estate Board,* 444 U.S. 232 (1980).

This jurisdictional test is apparently the test the Court of Appeals appointed in this case. It examined the size of defendants' overall business activity during the applicable period ($4,200,000) and the $1,000,000 volume in monuments and markers and concluded that "the enterprises affected by tying

arrangements were within the stream of interstate commerce regulated by the Sherman Act" (666 F.2d at 1144; App. at A-36).

But, as shown above, this is not the test for a *per se* tying violation. Proof of such a violation requires proof of foreclosure of a substantial market in interstate commerce, not merely proof that the enterprises affected were in commerce.

This issue of the relationship between the Sherman Act jurisdictional requirement and the substantive market foreclosure element of a tie-in violation is appropriate for this Court's certiorari jurisdiction. The Eighth Circuit's loose analysis effectively reads an essential element of a *per se* violation — interstate market foreclosure — out of the law. Application of such analysis in future cases could lead to the condemnation as *per se* violations of arrangements which have no measurable anticompetitive impact and which only tangentially affect interstate commerce. It is extremely doubtful that this Court intended to reach such a result by its opinions in *International Salt* and *Northern Pacific*. This Court should, therefore, grant certiorari to clearly define the relationship between the interstate commerce element of the Sherman Act (which the Court of Appeals found present here) and the substantive market foreclosure element of a tying violation, which was clearly absent.

III. The Court Of Appeals' Finding Of A Conspiracy Is A Departure From The Normal Course Of Judicial Proceedings Which Requires This Court's Exercise Of Its Certiorari Jurisdiction.

A separate basis for the Court of Appeals' liability finding was its conclusion that there was a conspiracy among the defendant cemeteries to establish and maintain the rule which is questioned here. The District Court explicitly found no conspiracy: "There was and is no conspiracy by simultaneous agreement or

by participation in a plan defendants had knowledge of, between any of the defendants regarding the price for foundation services or the adoption or maintenance of the Rule." *Rosebrough Monument Co.* v. *Memorial Park Cemetery Assoc., supra,* 505 F.Supp. at 530, App. at A-11. The Court of Appeals, as in so much of its opinion, did not even pay lip service to the clearly erroneous standard of Fed.R.Civ.P. 52(a). Rather, the Court of Appeals made its own finding on the basis of circumstantial evidence that the foundation policy was established and maintained by concerted or collaborative action. 666 F.2d at 1136-40; App. at A-21-27.

The opinion on this point misreads the record below. The Eighth Circuit said, "Minutes from the Association meetings reflect that the policy was frequently discussed and strongly supported by the Association." 666 F.2d at 1140, App. at A-27. The Court described the exclusive foundation preparation policy as "promoted, adopted and enforced by the members of the Association." 666 F.2d at 1139; App. at A-26. In fact, the record below and the minutes of the defendants' trade association[6] show that no collective action was taken to adopt or enforce a common foundation policy. In fact, there is no reference to the policy whatever in the association's minutes until after the Ninth Circuit *Moore* decision came down, when the possibility of specifications was discussed. This hardly justifies the Eighth Circuit's sweeping conspiracy finding.[7] Moreover, the Court of Appeals' "findings" ignore the existence of the Rule in all defendant cemeteries long before the association was even formed.

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[6] The minutes of the trade association which were the evidence explicitly relied on by the Eighth Circuit to support this finding, were Exs. 13, 13A, and 13B in the District court. Petitioners are requesting the Clerk of the Court of Appeals to transmit this portion of the record to this Court.

[7] The Court of Appeals' conspiracy finding is even more indefensible as it applies to Petitioner Memorial Park — which is not and never was a member of the Association.

In reversing the District court's "no conspiracy" finding and entering a finding of its own, the Eighth Circuit has taken to itself a power which even this Court has refused to assume. In *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485 (1950), this Court (on a direct appeal from a District Court), held that the adoption of standard rates by a local real estate board was a violation of the Sherman Act. But the Court affirmed a finding for certain defendants whom the District Court found had not conspired. Justice Douglas explained this Court's restraint:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent [citations omitted]. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous'." 339 U.S. at 495-96.

In the case at bar the Eighth Circuit failed to follow this Court's example, ignored the District Court's soundly based findings of no conspiracy, and made its own conspiracy finding based on its misreading of the record. Even if the important tying issues were not presented, this departure from the normal course of proceedings would require this Court's intervention by certiorari. As it is, this Court should consider this question as an incident to its broader consideration of the important issues raised in points I and II of this Petition.

CONCLUSION

As the facts of this case demonstrate, parties who make commercial arrangements and courts who judge them require this Court's assistance in the confused area of the law of tying. This case is an ideal one for this Court to develop the tests to use in

distinguishing between pernicious tying arrangements and those business arrangements which serve the interests of competition and the consumer. Certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 77-883 C (1)

Rosebrough Monument Company,
Plaintiff,

vs.

Memorial Park Cemetery Association, et al.,
Defendants.

JUDGMENT

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants have judgment against plaintiff on plaintiff's complaint; and

IT IS FURTHER ORDERED that the costs of this action be taxed against the plaintiff.

Dated this 15th day of September, 1980.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 77-883 C (1)

Rosebrough Monument Company,
Plaintiff,

vs.

Memorial Park Cemetery Association, et al.,
Defendants.

MEMORANDUM

This matter is before the Court for a decision on the merits following a ten day bench trial held in September of 1979.

Plaintiff brings this action pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and Sections 1-3 and 14 of the Sherman Act, 15 U.S.C. §§ 1, 2, 3 and 14 seeking treble damages and injunctive relief for defendants' alleged violations of those sections by conspiring to engage and engaging in tie-in arrangements, by fixing prices, and by conspiring to monopolize and monopolizing the sale, manufacture, maintenance and installation of gravemarkers in the St. Louis metropolitan area.

After consideration of the testimony adduced at trial, the exhibits introduced in evidence, the briefs of the parties, and the applicable law, the Court hereby makes and enters the following findings of fact and conclusions of law. Any finding of fact equally applicable as a conclusion of law is hereby adopted as such and, conversely, any conclusion of law applicable as a finding of fact is adopted as such.

Findings of Fact

1. Plaintiff Rosebrough Monument Company is a privately held Missouri corporation in good standing with its principal place of business in St. Louis, Missouri which manufactures and sells monuments and markers and performs certain services in connection therewith in the St. Louis metropolitan area.

2. Each defendant is a Missouri corporation which now owns and operates a cemetery in the St. Louis metropolitan area. The defendants and the cemeteries they operate are:

Defendant	Name of Cemetery
Memorial Park Cemetery Association	Memorial Park Cemetery
Valhalla Cemetery, Crematory & Mausoleum Company	Valhalla Cemetery, Crematory & Mausoleum Company
Lake Charles Memorial Park, Inc.	Lake Charles Memorial Park
W. J. Investment Company	Mount Lebanon Cemetery, Crematory and Mausoleum
Lakewood Park Cemetery, Inc.	Lakewood Park Cemetery, Inc.
Sunset Burial Park, Inc.	Sunset Burial Park & Mausoleum
Stanza & Company	Oak Grove Cemetery
Laurel Hill Memorial Gardens, Inc.	Laurel Hill Memorial Gardens
Mason Securities Company	Hiram Cemetery
Mount Hope Cemetery & Mausoleum Co.	Mount Hope Cemetery & Mausoleum
Southern Securities Company	Park Lawn Cemetery

3. There are about fifty cemeteries located in St. Louis City and County. With the exception of a few country cemeteries, all of them, including the defendants, have a rule (hereinafter referred to as "the Rule") which provides that the cemetery will perform the interment service and will prepare the foundation for any memorial placed on a gravesite in that cemetery. The cemetery imposes a charge for these services and all grave spaces are sold subject to the Rule. The Rule has been in effect since the cemeteries began operating. The Rule does not require that a memorial be placed, thus there is no absolute requirement that foundation services be performed by the cemetery.

4. Since 1972, there have been approximately 15,000 deaths each year reported in St. Louis City and St. Louis County. Of the defendant cemeteries, Sunset usually had the highest number of interments; in 1978 it had 628 or about 4.5% of the reported deaths, while in that year Hiram was the lowest with only 110 interments, about .9% of the reported deaths. In 1978, all defendants together buried less than 22% of the total number of persons who died in St. Louis City and County.

5. There are about 6 or 7 non-cemetery monument dealers in the area which sell memorials (monuments and markers) to relatives of deceased persons who are buried in a cemetery in the area. Plaintiff is the largest and has two offices, one in the northern part of St. Louis and the other in the southern park of St. Louis. Both offices display memorials and both are located near large cemeteries. Sales persons located at each office solicit business from death notices or other leads whereby plaintiff gets notice of a recent death or burial in the area.

6. Each defendant operates an endowment type, fully managed cemetery. Each sells cemetery grave spaces in its own cemetery thereby granting the owner a right of interment for which the cemetery renders a charge, and the right to place a memorial on the gravesite for which the cemetery also renders a charge. The

cemetery not only agrees to perform these services, but also agrees to maintain the cemetery properly in perpetuity. By statute the cemetery is required to have a perpetual care fund, to assure the performance of the maintenance obligation with a minimum payment of at least 10% of the purchase price of each grave space sold being paid into a separately managed irrevocable trust. Five of the defendant cemeteries also have memorial care funds and a portion of the cemetery's charge for memorial foundations is paid into a trust.

7. Each of the defendant cemeteries sells markers, and some sell monuments, for installation in its own cemetery. Each defendant's memorial sales are only for placement in its own cemetery and the cemetery thus competes with plaintiff and all other monument dealers in the area for such sales in its own cemetery. None of the defendant cemeteries require persons who own a grave space in their respective cemetery to buy a memorial from them and plaintiff sells memorials which are installed on gravesites in each defendant's cemetery. It is apparent from the testimony aduced herein that an uncertain number of purchasers elect not to purchase a permanent monument or marker.

8. The defendant cemeteries sell grave spaces "pre-need" (before a death) or "at-need" (at death). In connection with these sales the buyer may elect to purchase a memorial from the cemetery. In the case of a pre-need sale of a grave space and memorial, the installation will normally be deferred until interment. In other cases only the lot is purchased and the decision on the memorial is deferred and is made at-need.

9. When plaintiff or any other non-cemetery monument dealer sells a memorial to a lot owner in one of the defendant cemeteries (or in a non-defendant cemetery in this market area other than the few country cemeteries without work crews), it arranges with the cemetery to prepare the foundation. Plaintiff

then delivers the memorial to the cemetery which has prepared the foundation and the memorial is then "set" on the foundation. Plaintiff is allowed to set memorials in some of the defendant cemeteries.

10. Each cemetery has its own procedure for preparing a foundation which in its judgment represents the best way to install the particular type of memorial in its particular cemetery. The various steps involved in handling the order, locating the site, scheduling and performing the foundation work and setting and resetting of memorials in the defendant cemeteries requires the cemetery to use its clerical and outside employees, foundation materials and equipment. The cemetery's work crew and equipment are also used to perform the cemetery's interment and maintenance services. For various reason, (e.g., unusual soil or weather conditions, improper foundation workmanship, improper specifications, improper maintenance, defective materials) difficulties may arise with previously performed foundation work. Resetting work is more or less constant in the cemeteries, ranging from approximately 50 to 150 resettings per year, depending on the cemetery.

11. Though charges for foundation services varied among the cemeteries their billing processes were similar. When the grave space owner buys a memorial from the cemetery the buyer is billed by the cemetery for the memorial and the foundation services. In the case of a memorial sale by plaintiff (or other non-cemetery monument dealer) the defendant cemetery bills the monument dealer for its foundation work and the dealer in turn includes this charge in its price billed to its customer for the memorial. If the transaction is pre-need, some of the services will obviously be performed at a future date, yet the commitment of the parties insofar as the foundation services are concerned is made at the time of the transaction. The fact that the foundation services or interment services may be deferred and billed through different entities does not destroy the unitary nature of the "product" sold.

12. With respect to plaintiff's tie-in claim against defendants, the Court finds that there was no tie because the sale of a grave space includes interment and foundation services and the transaction does not involve the sale of two separate and distinct products. The defendants do not sell interment services or foundation services outside of their cemetery or apart from their interest in land sold to the buyer. There is no separate market for the sale of installation services apart from the sale of a cemetery lot. Consumers only buy memorials to put them in cemeteries. In order to do that, the buyer must own or contemplate owning an interest in land giving them the right to place a memorial. While plaintiff has attempted to fragmentize the components of the transaction in an effort to show a tie-in, it is clear to this Court that each cemetery sells one bundle of services which are essential to the proper operation of a cemetery and that this single "product" includes a grave space which gives the buyer the right to be buried in that space and the right to have a memorial placed on that space.

13. The cemetery agrees to provide the buyer with an environment which is substantially the same as exists when the grave space is purchased. To assure this, the cemetery agrees to and does provide perpetual care for that grave space and all others in the cemetery. By transferring limited ownership in the land, the cemetery retains the control essential to fulfillment of its obligation to maintain the environment in perpetuity. The interment charges are not in issue, and the foundation charges are divergent and upon the proof submitted appear competitive and reasonable. Comparison of these charges with plaintiff's incredible estimates and promises is meaningless.

14. Defendant cemeteries neither alone nor considered together have any economic dominance to exclude competitors or to control price for grave spaces, the alleged tying product.

15. Defendant cemeteries are non-sectarian and bury persons of all races and all religious beliefs. These cemeteries, therefore,

compete with every other cemetery in the market for the sale of grave spaces and full endowed care cemetery service. No one cemetery is a market, and though each cemetery has its own attractive attributes, each sells a package reasonably interchangeable with the others. There do not appear to be any trade barriers, geographic or otherwise, preventing any endowed care cemetery from offering, or any purchaser from accepting, what is in essence a pleasant environment for a final resting place, and a pleasant environment for visiting deceased individuals. There was no sub-market as contended by plaintiff, either in respect to each cemetery being its own relevant georgraphic market, or with respect to defendants' 22% market share comprising an atheist—agnostic—no religious affilitation—no military affiliation sub-market.

16. There is no interstate commerce involved in the sale of either the claimed tying (grave space) or the tied (foundation service) "product". Neither moves in interestate commerce. All of the defendant cemeteries are located in Missouri and the purchase and use of grave spaces are local transactions. The interment and foundation services involved in use of the lot for burial services are all Missouri transactions. Plaintiff has not shown that the number of memorials coming into the St. Louis market would be any greater or less but for the Rule, nor is there any evidence that the wholesale or retail price of memorials absent the Rule would be any different. The record simply does not admit of a finding that the Rule had some adverse effect on the interstate commerce movement of memorials.

17. The Rule as applied in the defendant cemeteries was and is justified. The basic reason for the Rule is to preserve the necessary control in the cemetery to assure quality memorial installation performed by a labor force sufficiently reactive, responsible and skilled which will not disrupt the cemeteries over-all operation, nor impair or injure the cemetery's ownership interest in the land. The Court finds that foundation work

is important and is an inseparable part of the cemetery's responsibility to provide perpetual care. Goodwill, insofar as that term relates to the reputation of a company affecting in a material manner its ongoing operations, is clearly not the only purpose underlying the Rule. The ownership interest of the cemetery and its perpetual maintenance obligation transcend mere goodwill. It is reasonable for the cemetery to require that its employees perform the foundation services including the location and the layout of the foundation site, the scheduling of the foundation work relative to funerals in the cemetery, the actual preparation of a quality foundation, the setting of the markers, the clean-up and the future resetting of a memorial, when necessary.

18. Plaintiff's proposal that it be allowed to prepare foundations for the memorials it sells in each of defendants' cemeteries is not feasible as it involves severely divided accountability and is a burdensome alternative to the practice now employed by defendants. No doubt specifications could be prepared to describe the different foundation procedures of each cemetery. However, based upon all the evidence the Court finds the alternative impractical. Plaintiff seeks to minimize the proper execution of this work and emphasize its own business abilities, at the same time contending that it would do this work without profit and for its own unrealistic estimates of cost. Problems are likely to occur during any third party execution of the work including, inter alia:

> (a) each cemetery has its own work crew familiar with the layout and outside operations of the cemetery which maintains the cemetery, prepares and handles interments and prepares foundations for memorials. In seven of the cemeteries outside employees are represented by a labor union. The employees whom plaintiff uses for the delivery of memorials and the setting of memorials and whom it would use to perform foundation work are members of a different union. The court can foresee difficulties par-

ticularly in the supervision and control of the men employed by the monument dealers by the men employed by the cemetery.

(b) the cemetery foundation work, which often requires bringing in a cement truck, must be scheduled at a time so as not to coincide with or otherwise disrupt a funeral taking place within the cemetery.

(c) the process of setting memorials is not an exact science. Inevitablay some memorials have to be reset. One problem relates to the placement of a memorial on or proximate to a freshly dug grave. The court can readily envision disputes concerning the assignment of fault between the cemetery and monument dealers. As a practice matter, the cemetery remains ultimately responsible to the lot owner if it intends to continue to run a well maintained cemetery.

(d) locating the precise site for the foundation by individuals who are unfamiliar with the particular cemetery's lot shapes, sizes and marking systems.

19. While this plaintiff may comply with the cemetery's requirements as well as the various commitments made by its ocunsel, other monument dealers may not. The Rule has to be judged in light of the alternative, allowing all monument dealers and even lot owners themselves to perform the work. Implementation of the alternative would place an unreasonable burden on the cemetery.

20. Third party installation would still involve the services of the cemetery in scheduling the work, locating the site, supervising the work and handling the resetting of the memorials, perhaps years after installation. The cemetery would be entitled to be compensated for its services related to this work. Based on the evidence adduced herein the Court finds that in the long run the public would pay more for the services if third party installation was permitted.

21. Five of the defendant cemeteries have a collective bargaining agreement with Local 50 which provides that the employees of those cemeteries have the exclusive right to perform all work in the cemetery which includes preparing foundations. This is but a recognition of the practice of the other cemeteries in the area and there is no evidence that this provision in the contract was inserted to injure plaintiff or any monument dealer or because of the cemetery's memorial sales in competition with them.

22. There was and is no conspiracy by simultaneous agreement or by participation in a plan defendants had knowledge of, between any of the defendants regarding the price for foundation services or the adoption or maintenance of the Rule. In this regard, the Court expressly discredits the testimony of Eugene Rosenbloom. There is no credible evidence that foundation prices were discussed among defendants, and defendants' foundation charges do not disclose any conscious paraellelism. Indeed, the evidence discloses a wide divergence of pricing identity and virtual absence of simultaneous price movements while roughly equating to the wage rate increases paid by defendants.

23. Plaintiff was not injured by the Rule. The Court finds that plaintiff's decline of business in certain of defendants' cemeteries was due to the competition with that cemetery or other market factors such as an increase in business by another monument dealer or a decline of business in the cemetery. Plaintiff's reliance on unit sales figures without any reference to market shares in a particular year or the competitive factors at work within the market renders appendix A of plaintiff's post-trial memorandum worthless.

24. Plaintiff was not damaged in any amount capable of ascertainment by this Court. Plaintiff's evidence of damages was wholly speculative.

Conclusions of Law

This Court has personal jurisdiction over the parties herein and has subject matter jurisdiction pursuant to 15 U.S.C. § 15.

Initially the Court notes that plaintiff has apparently abandoned its claims under §§ 2 and 3 of the Sherman Act. Plaintiff has not briefed its monopolization claim and insofar as the Court can determine the reference to § 3 must have been a mistake since § 3 of the Sherman Act outlaws restraints of trade or commerce in any territory or in the District of Columbia. In any event, with respect to plaintiff's monopolization claim, plaintiff has proven none of the elements of monopolization or an attempt or conspiracy to monopolize. There has been no showing of any defendant's individual possession of monopoly power in the St. Louis and St. Louis County market for the sale, manufacture, service and installation of grave markers and memorials nor their collective possession of such power. Furthermore, plaintiff has now shown on the part of any individual defendant nor group of defendants (1) specific intent to monpolize; (2) overt acts; and (3) a dangerous probability of monopolization of the marker or monument market and services connected therewith in the St. Louis and St. Louis County geographic market. *See Morning Pioneer, Inc.* v. *Bismarck Tribune Co.*, 493 F.2d 383 (8th Cir.), *cert. denied* 419 U.S. 836 (1974). Plaintiff's failure to show any defendant's intent to acquire unlawful monopoly power by means of proscribed conduct is fatal to its claim of conspiracy to monopolize. *See American Tobacco Co.* v. *United States,* 147 F.2d 93 (6th Cir. 19744), *aff'd* 328 U.S. 781, 808-09 (1946).

As set forth in finding of fact number 22, no conspiracy to fix prices has been shown.

Similarly, plaintiff has failed to prove a tie-in arrangement in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 or Section 3 of the Clayton Act, 15 U.S.C. § 14. With respect to plain-

tiff's claim under Section 3 of the Clayton Act, the Court notes that by the manifest terms of the statute even plaintiff's allegations are insufficient to state a claim. Section 3 of the Clayton Act does not cover alleged tying arrangements where the tying or tied product is a service. While it might be argued that defendants supply merchandise in connection with performing the foundation services and such merchandise is a "commodity" within the terms of the Clayton Act, viewing the dominant nature of the transaction it is clear that installation of the foundation is a service and not "goods, wears, merchandise, machinery, supplies or other commodities". *See Moore* v. *Jas. H. Matthews & Co.*, 550 F.2d 1207, 1214 (9th Cir. 1977); *Wendkos* v. *ABC Consolidated Corp.*, 379 F.2d 15, 18 (E.D. Pa. 1974).

For the purpose of this case a tie-in arrangement may be defined "as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5-6 (1958). The per se illegality under Section 1 of the Sherman Act of a tie-in arrangement is established when plaintiff shows one "that an individual has actually tied two separate and distinct products into a single package...second, that the individual possesses sufficient economic power in the tying market to appreciably restrain competition; and third, that the arrangement affects a 'not insubstantial' amount of interstate commerce." *Northern* v. *McGraw-Edison Co.*, 542 F.2d 1336, 1345 (8th Cir. 1976).

In the opinion of this Court, defendants sold only one "product"—an interest in land in their cemeteries which entitles the buyer to (1) a right of interment in a grave space; (2) a right to place a memorial on the grave space; and (3) perpetual care. That the cemetery may later be paid for performing the service of installing a foundation for a memorial is merely the ancillary

method by which "part of the product" is delivered to the buyer. As Judge Aldiserts pointed out in *Ungar* v. *Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1222 (3rd Cir. 1976):

> [W]e feel compelled to take a pragmatic and prudential, as well as jurisprudential, view of the problem before us, taking into out perspective both the nature of the...industry and the effects which may be perceived to flow from the decision under review.

The delivery of foundation services by the cemetery is an ancillary service in connection with making the sale of the cemetery lot. While ancillary, it is also a necessary part of its business if the lot is to be maintained perpetually by the cemetery. Furthermore, this Court cannot ignore the ownership interest of the cemetery. In Missouri, the buyer of a grave space acquires a mere right, privilege or easement of interment, regardless of the form of conveyance, and the cemetery retains fee simple title. *Billings* v. *Paine,* 319 S.W.2d 653, 656-57 (Mo. 1959). A property owner who sells a limited interest in land which he is to maintain in perpetuity ought to be able to perform services incidental to that sale when they affect its ownership interest and future obligations. For this reason, the condominium analogy is not apposite here. *See e.g., Miller* v. *Granados,* 529 F.2d 393 (5th Cir. 1976); *Jones* v. *247 East Chestnut Properties,* 1975-2 Trade Reg. Rep. ¶ 60,491, (N.D. Ill. 1974). *But see, Moore, supra* at 1215. Here, the cemetery owns the predominant interest in the property to be managed and the management and maintenance functions of endowed care cemeteries represent the dominant features of the product that they sell. While condominium owners may be in a position to meet and collectively determine their needs in management of their own property, patrons of sull service, managed, regulated and endowed care cemeteries purchase a fixed responsibility for the collective performance of all essential cemetery services by the cemetery itself. Plaintiff understandably decries defendants'

focus on business justifications in determining product separability. However, it appears beyond cavil that separability is based not only upon the physical characteristics of the items involved but also on the business justifications for selling the two products in one package. *See,* 2 Kintner, Federal Antitrust Law, § 10.54, p. 230 (1980).

Normally in a case involving a tie there is a demand for the tied product independent of the tying product. Here there is no separate market for foundation services. Defendants only sell their foundation services incidental to the sale of a grave space in their own cemetery, and while plaintiff desires to perform the service in the defendants' cemeteries, it desires to do so only with respect to its own sale of memorials. The absence of a separate market for foundation services distinct from the sale of cemetery lots or memorials strongly indicates the correctness of defendants' package of rights theory. *See Washing Gas Light Co.* v. *Virginia Electric & Power Co.,* 438 F.2d 248, 253 (4th Cir. 1971).

The usual tie-in involves an on-going market foreclosure in the tied product. *See e.g., Northern Pac. R. Co.,* v. *United States, supra; Miller* v. *Granados, supra.* The sale of cemetery services deriving from the right to have a memorial placed on the grave space, while dependent on exercise of the right, is in fixed proportion to the sale of grave spaces. Recognizing that some latitude is necessarily involved in product definition, Professor Turner has suggested a fixed proportion test:

> The sale of items used in fixed proportions might be deemed prima facie the sale of a single product; the combined sale of items used in variable proportions, prima facie a tie-in of different products.

Turner, The Validity of Tying Arrangements Under the Antitrust Laws. 72 Harv.L.Rev. 50, 72 (1958).

Assuming separate products and separate markets plaintiff has also failed to show the second element of a tie-in case, the economic power requirement. It is clear on the evidence submitted that defendants are without sufficient economic power in the grave space market to restrain competition in the market for foundation services. To determine market dominance it is first necessary to establish the relevant market. Initially, plaintiff chose the market of the City and County of St. Louis, Missouri. However, comparing the number of interments by any defendant or the defendants collectively discloses the absence of market dominance. Similarly, plaintiff has not shown uniqueness or land related leverage on the part of any cemetery by which market dominance might be inferred. *See United States Steel Corp.* v. *Fortner Enterprises,* (Fortner 2), 429 U.S. 610, 620-22 (1977). Similarly, since defendants compete not only with each other but with all other cemeteries in the relevant geographical market there is no sub-market as contended by plaintiff. While certain denominational cemeteries may bury a high percentage of their deceased affiliates, the evidence does not even suggest an absence of cross-elasticity of demand. For instance, undisputed testimony indicates that between 10% to 35% of the burials in some of defendants' cemeteries are Catholic. *See SmithKline Corp.* v. *Eli Lilly & Co.,* 575 F.2d 1056, 1063 (3rd Cir. 1978).

Neither the claimed tying product nor the claimed tied product move in interstate commerce. All of defendants' cemeteries are located in Missouri and the foundation service is clearly a local service performed on lots which are located in Missouri. Plaintiff's argument is that the practice affects the sale of memorials which do move in interstate commerce and that it would have sold more memorials and one or more defendants would have sold fewer, however, there has been no showing that the number of memorials coming into the St. Louis market would be any different absent the Rule. Nor is there any credi-

ble evidence that the price of memorials, wholesale or retail, would be any different. *See Burke* v. *Ford,* 389 U.S. 320, 321 (1967).

Defendants have established that the rule as applied in this case is justified. Justification is a defense in a tie-in case. *Ungar* v. *Dunkin Donuts of America, Inc., supra; Susser* v. *Carvel,* 332 F.2d 505 (2nd Cir. 1964), *cet. dismissed* 381 U.S. 125 (1965). Delegation of performance of foundation services to third party defendants would be a highly burdensome alternative which would not adequately protect defendants' rights and their ability to honor their obligations, and would almost certainly result in raising the price of foundation services to the buyer.

Having found that the Rule is not illegal per se, is justified by legitimate business purposes, is no more restrictive than necessary, and that plaintiff has not shown detrimental market impact, no § 1 violation exists under application of the Rule of Reason analysis. Finally, there is no evidence of an agreement by two or more defendants to perform any unlawful act or to perform a lawful act by unlawful means.

Plaintiff has failed to prove any violation of the antitrust laws by any defendant. Accordingly, judgment will be entered for all defendants against plaintiff.

Dated this 15th day of September, 1980.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1963

Rosebrough Monument Company,
Appellant,

v.

Memorial Park Cemetery Association, a corporation; Valhalla Cemetery, Crematory and Mausoleum Company, a corporation; Lake Charles Memorial Park, Inc., a corporation; Alexander & Sons, Inc., a corporation, d/b/a Mount Lebanon Cemetery and Mausoleum; Lakewood Park Cemetery, Inc., a corporation; Sunset Burial Park, Inc., a corporation; Stanza & Company, Inc., a corporation d/b/a Oak Grove Cemetery; Laurel Hill Memorial Gardens, Inc., a corporation; Mason Securities Company d/b/a Hiram Cemetery; Mount Hope Cemetery and Mausoleum Company, a corporation; Southern Securities Company, a corporation, d/b/a Park Lawn Cemetery,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: June 16, 1981
Filed: December 9, 1981

Before McMILLIAN and ARNOLD, Circuit Judges, and HANSON,* Senior District Judge.

McMILLIAN, Circuit Judge.

Appellant Rosebrough Monument Co. appeals from a final judgment entered in the District Court for the Eastern District of Missouri denying its claims for treble damages and injunctive relief for antitrust violations. For reversal appellant contends that the district court erred in (1) finding that the cemeteries did not conspire to monopolize the sale, manufacture, installation and maintenance of grave monuments and markers in the St. Louis metropolitan area; (2) finding that the exclusive foundation preparation policy did not constitute an illegal tying arrangement; and (3) finding that appellant suffered no damages as reflected in a general decline in business and profits. We reverse in part and remand for further proceedings.

Appellant is a privately held Missouri corporation that manufactures and sells burial markers and monuments and performs certain installation services in connection therewith.[1] Each appellee is a Missouri corporation that owns and operates a cemetery in the St. Louis metropolitan area.

For at least twenty years, virtually all of the nearly fifty cemeteries located in the St. Louis metropolitan area have had an agreement which requires the preparation of the foundation for grave monuments or markers be done exclusively by the

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* The Honorable William C. Hanson, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

[1] A monument is a stone memorial or tombstone consisting of two parts, the base and the die which is set upright upon the base. A marker, on the other hand, is a smaller flat memorial that is frequently made of bronze, copper or some other metal.

cemtery that owns the lot. Under the terms of the exclusive foundation preparation policy, independent memorial dealers such as appellant can sell grave markers or monuments to the general public, but only the cemeteries can prepare the foundations for them. Some of the cemeteries allow appellant to place or position its memorials or markers on cemetery-prepared foundations. The cemeteries charge appellant for foundation preparation and appellant must then pass the charge on to the customer. The cemeteries, however, do not require that a monument or marker be placed on every grave site.

Each cemetery sells markers (and some sell monuments) for installation on its own grounds. Thus, the cemeteries are in competition with appellant and all other monument dealers in the St. Louis metropolitan area for the sale of grave markers and monuments.

Appellant seeks injunctive relief alleging that the exclusive foundation preparation policy constitutes an illegal tying arrangement which restrains competition and ultimately results in a higher price to consumers.

For a tying arrangement to exist, at least two distinct products or services must be sold or leased. The cemeteries generally deny any illegal tying arrangement, arguing that only one product is being sold. All cemeteries operating in Missouri have a perpetual statutory obligation to maintain the appearance of their property. Ten percent of the purchase price of each grave site is paid into a separately managed irrevocable trust fund for the care and upkeep of each cemetery. (MO. REV. STAT. § 214.270-410 (1978)). As an affirmative defense, appellees justify their exclusive foundation preparation policy on the ground that, as endowed care cemeteries, they are responsible in perpetuity for all grave memorials and frequently have to reset many that have setled or shifted. Thus, according to appellees, the benefit derived by the public because of the exclusive foundation preparation policy outweighs any alleged anticompetitive effect.

Following a bench trial, the district court found in favor of the cemeteries. *Rosebrough Monument Co.* v. *Memorial Park Cemetery Ass'n,* 505 F. Supp. 525 (E.D. Mo. 1980). According to the district court, the transaction involved the sale of just one product as a package deal (cemetery lot, interment, foundation preparation, and installation). The district court held that the exclusive foundation preparation policy was justified by the cemeteries' responsibility to provide perpetual care. The district court failed to find a conspiracy because there was no "conscious parallelism" in price setting for the foundation preparation work. Finally, the district court held that the alleged damages were wholly speculative. This appeal followed.

I. CONSPIRACY

In its complaint appellant alleges that appellees, individually and through their trade association (Cemetery Management Association of Greater St. Louis), conspired to restrain interestate commerce unreasonably in violation of § 1 of the Sherman Act.[2] 15 U.S.C. § 1. We agree.

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[2] 15 U.S.C. § 1 provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

In 1959, the cemetery owners in the St. Louis metropolitan area formed the Cemetery Management Association, a trade association[3] which includes among its membership all appellees

[3] A trade association is an organization of producers or distributors of a commodity or service upon a mutual basis for the purpose of promoting the business of their branch of industry and improving their service to the public through the compilation and distribution of information, the establishment of trade standards and the cooperative handling of problems common to the production or distribution of the commodity or service with which they are concerned.

S. KIRSH, TRADE ASSOCIATIONS, THE LEGAL ASPECTS 13 (1928) (citation omitted).

except Memorial Park Cemetery. Appellant argues that the trade association was the mechanism by which appellees forestalled competition when it adopted the exclusive foundation preparation policy.

In analyzing whether a trade association agreement restrains competition in the profession, federal courts have most frequently applied the "rule of reason."[4] *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 687-92 (1978) (*Professional Engineers*); *Continental T.V., Inc.* v. **GTE Sylvania, inc.,** 433 U.S. 36, 50 (1977) (*Continental T.V.*); *Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918); *Standard Oil Co.* v. *United States,* 221 U.S. 1, 50-58 (1911) (*Standard Oil*); *International Travel Arrangers, Inc.* v. *Western Airlines, Inc.,* 623 F.2d 1255, 1267 (8th Cir.), *cert. denied,* 101 S. Ct. 787 (1980); *Sherman* v. *British Leyland Motors, Ltd.,* 601 F.2d 429, 449-50 (9th Cir. 1979); *Ohio Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.,* 585 F.2d 821, 831 (7th Cir. 1978), *cert. denied,* 440 U.S. 930 (1979); *Oreck Corp.* v. *Whirlpool Corp.,* 579 F.2d 126 (2d Cir.) (banc), *cert. denied,* 439 U.S. 946 (1978); *Reed Bros.* v. *Monsanto Co.,* 525 F.2d 486, 499 (8th Cir. 1975), *cert. denied,* 423 U.S. 1055 (1976); *Grunin* v. *International House of Pancakes,* 513 F.2d 114 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975); *Worthen Bank & Trust Co.* v. *National BankAmericard, Inc.,* 485 F.2d 119, 127-28 (8th Cir. 1973),

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[4] Conspiracies or group boycotts that by agreement or otherwise result in price fixing are *per se* violations of § 1 of the Sherman Act. *United States* v. *Topco Assocs.,* 405 U.S. 596, 606-09 (1972). The mere exchange of price data and other information among competitors, however, is not *per se* illegal; indeed, such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 441 n.16 (1978). Appellant appears to have asked this court to find a *per se* price fixing violation of § 1. We decline its invitation installation policy under the rule of reason. *See* Montague, *"Per Se Illegality" & the Rule of Reason,* in 12 ABA ANTITRUST SECTION 69-104 (1958).

cert. denied, 415 U.S. 918 (1974); *Albrecht* v. *Herald Co.,* 367 F.2d 517, 525 (8th Cir. 1966), *rev'd on other grounds,* 390 U.S. 145 (1968). *See also* Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason,* 66 COLUM. L. REV. 1487, 1502 (1966). The rule, which focuses directly on the challenged restraint's impact on competitive conditions, has been regarded as the standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction. *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271, 282-83 (6th Cir. 1898), *modified,* 175 U.S. 211 (1899). The rule of reason, with its origins in common law, has given shape to the Sherman Act's broad pronouncements against agreements that restrain competition. "It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant." *Professional Engineers, supra,* 435 U.S. at 688.

To be successful in its cause of action alleging a conspiracy to unreasonably restrain trade under the rule of reason, appellant must establish: (1) an agreement among two or more persons or distinct business entities, (2) which is intended to harm or unreasonably restrain competition, and (3) which actually causes injury to competition. *See generally Kaplan* v. *Burroughs Corp.,* 611 F.2d 286, 290-91 (9th Cir. 1979), *cert. denied,* 447 U.S. 924 (1980); *Gough* v. *Rossmoor Corp.,* 585 F.2d 381, 389 (9th Cir. 1978), *cert. denied,* 440 U.S. 936 (1979). The primary considerations in determining whether a restraint of trade is unreasonable are whether the intent of the restraint is anticompetitive and whether the restraint itself has significant anticompetitive effects. *See Sherman* v. *British Leyland Motors, Ltd., supra,* 601 F.2d at 449.

Simply stated, the inquiry mandated by the rule is whether, on balance, the challenged agreement is one that "merely regulates and perhaps thereby promotes competition or whether

it is such as may suppress or even destroy competition." *Continental T.V., supra,* 433 U.S. at 49 n.15, *citing Board of Trade* v. *United States, supra,* 246 U.S. at 238 (Brandeis, J.). To arrive at a conclusion, the factfinder must weigh all of the circumstances surrounding the agreement (i.e., the market impact, public benefits, economic justifications and competitive effect) before deciding whether the practice should be prohibited as imposing an unreasonable restraint on competition. *Id.* at 49-51.

"Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." *Professional Engineers, supra,* 435 U.S. at 688. Agreements among competitors are justified under the rule only when a preponderance of the evidence supports the conclusion that the anticompetitive effect of the agreement is outweighed by the professional and public benefits derived from it.

As a general rule trade association agreements comport with federal antitrust laws unless they

> [have] not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.

Standard Oil, supra, 221 U.S. at 58; *see also United States* v. *American Tobacco Co.*, 221 U.S. 179 (1911).

The principal challenge raised by appellant is based upon the Cemetery Management Association's adoption of the exclusive foundation preparation policy. We hold that the exclusive foun-

dation preparation policy stunts rather than develops trade within the cemetery industry and limits consumer choice and the free flow of commerce.

The Cemetery Management Association of Greater St. Louis was started over twenty years ago. According to its bylaws, the Association was formed "for the advancement of management and better cemetery operations in the Greater St. Louis area." (Plaintiff's Ex. 13A). The Association has undertaken numerous efforts to enhance the quality of services provided to the public by their membership. The Association has worked diligently to improve the durability and handling of vaults and coffin boxes. The Association has also worked to make it easier for heirs of the deceased to transfer ownership or use of cemetery lots. The Association has also adopted policies that legitimately serve its own personal and professional interests. The Association maintains a political action committee that, among other things, solicits and disburses funds for candidates for political offices. The Association also maintains a negotiation committee that deals with labor disputes with the local unions. These activities of the Association are not objectionable and clearly comport with federal antitrust legislation.

As discussed below, however, the exclusive foundation preparation policy has stymied competition in the cemetery industry. The policy has effectively restrained competition among appellees, their coconspirator cemeteries and the other monument manufacturers who wish to perform foundation preparation and placement services. By its own terms, the poilcy prohibits companies that only manufacture or service memorials from competing with cemeteries for a share of the foundation preparation market. The policy also serves to restrain competition among members of the Association and other cemetery owners. By giving the individual cemetery owners the sole right to prepare the foundation, place, and maintain monuments in their respective cemeteries, a neighbor cemetery that performs the same foundation preparation and placement service at a

lower price is foreclosed from competing in the overall foundation preparation and placement market. In sum, the exclusive foundation preparation policy " 'impedes the ordinary give and take of the market place,' and substantially deprives the customer of the 'the ability to utilize and compare prices in selecting [foundation preparation and placement] services.' " *Professional Engineers, supra,* 435 U.S. at 692-93 (citing the district court opinion, 404 F. Supp. at 460).

The exclusive foundation preparation poicy as promoted, adopted and enforced by the members of the Association (Plaintiff's Exhs. 13, 13A) violates the rule of reason because it amounts to an agreement among competitors to reduce or restrain competition. *Professional Engineers, supra,* 435 U.S. at 696; *Goldfarb* v. *Virginal State Bar,* 421 U.S. 773, 788-89 (1975); *United States* v. *National Ass'n of Real Estate Boards,* 339 U.S. 485 (1950). Grave memorial companies and neighboring cemeteries should have an equal opportunity to compete in the foundation preparation and placement market with the owner of the cemetery lot. The marketplace, not an intraindustry agreement, should decide who provides the better service. *See Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U.S. 495, 512-14 (1969) (*Fortner I*) (White, J.) (summary of evils of tying arrangements). While the policy does not fix prices as such, it operates as an absolute ban on competition concerning the foundation preparation services provided by the cemeteries.[5]

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[5] Appellees' affirmative defense confirms rather than refutes the anticompetitive purpose and effect of the rule. Appellees argue that the restraint is justified because of their perpetual duty to maintain the appearance of their cemeteries. As the discussion below reveals, no cases have been found that accept such an argument. *Infra* at pp. 20-21. Appellees have not provided ample documentation for their assertion that the individual owner of the cemetery is the only concern that canprepare foundations or install or service grave monuments or markers in such a way that does not destroy the beautiful appearance and tranquil atmosphere of a cemetery's grounds.

It is not necessary to find by direct evidence appellees had a specific unlawful conspiracy under § 1 of the Sherman Act. It is well established that circumstantial evidence may suffice to support an inference that a conspiracy to unreasonably restrain competition exists. *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 221-27 (1939); *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc.,* 497 F.2d 203, 208 (9th Cir.), *cert. denied,* 419 U.S. 999 (1974). When the circumstantial evidence leads to the conclusion that concerted or collaborative action has been contemplated and undertaken by competitors with the purpose and effect of eliminating competition among themselves or from others, a Sherman Act violation has been committed. *United States* v. *General Motors Corp.,* 384 U.S. 127, 142-43 (1966); *United States* v. *Griffith,* 334 U.S. 100, 105 (1948); *Interstate Circuit, Inc.* v. *United States, supra,* 306 U.S. at 227; *Ogilvie* v. *Fotomat Corp.,* 641 F.2d 581, 587 (8th Cir. 1981); *Admiral Theatre Corp.* v. *Douglas Theatre Co.,* 585 F.2d 877, 883-84 (8th Cir. 1978) (applying rule of reason analysis; *Arthur Murray, Inc.* v. *Reserve Plan, Inc.,* 406 F.2d 1138, 1144-45 (8th Cir. 1969); *Union Pacific Coal Co.* v. *United States,* 173 F. 737, 745 (8th Cir. 1909).

Minutes from the Association meetings reflect that the policy was frequently discussed and strongly supported by the Association. Because the anticompetitive effect of the exclusive foundation preparation policy is obvious and outweighs any public benefit or procompetitive effect, we find that an unreasonable restraint on competition was the foreseeable consequence intended by the Association and its membership.

Having found that appellees conspired to unreasonably restrain trade or commerce in violation of § 1 of the Sherman Act,[6] we turn to an examination of the conditions allegedly constituting an illegal tying arrangement.

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[6] In adopting the Sherman Act, Congress "intended to exercise its power to the fullest extent under the Commerce Clause." *Chatham Condominium Ass'ns* v. *Century Village, Inc.,* 597 F.2d 1002, 1006 (5th Cir. 1979); *Joe Westbrook, Inc.* v. *Chrysler Corp.,* 419 F. Supp. 824, 836 (N.D. Ga. 1976), *quoting United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533, 558 (1944).

II. TYING ARRANGEMENT

A tying arrangement is defined as the sale or lease of one item (the tying product) on the condition that the buyer or lessee purchase a second item (the tied product) from the same source. *See Northern Pacific R.R.* v. *United States,* 356 U.S. 1, 5-6 (1958) (*Northern Pacific*); *IBM Corp.* v. *United States,* 298 U.S. 131 (1936); *Kugler* v. *AAMCO Automatic Transmissions, Inc.,* 460 F.2d 1214 (8th Cir. 1972); *see also* Turner, *The Validity of Tying Arrangements Under the Antitrust Laws,* 72 HARV. L. REV. 50 (1958). Tying arrangements deny competitors and consumers free access to the tied product market, not because the seller of the tying product has a superior product in the tied market, but because of the leverage exerted by the seller using the tying product. *Moore* v. *Jas. H. Matthews & Co.,* 550 F.2d 1207, 1212-15 (9th Cir. 1977) (*Moore*); *see also* 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶733, at 257-59 (1978) (AREEDA ANTITRUST). Tying sellrs, who may hold a legitimate monopoly of the tying product, are often working towards an illegitimate monopoly of the tied product. *See Fortner I, supra,* 394 U.S. at 512-14.

Tying arrangements are presumptively illegal if three elements exist, and once those are demonstrated no specific showing of unreasonable anticompetitive effect is needed. *International Salt Co.* v. *United States,* 332 U.S. 392, 394-96 (1947) (*International Salt Co.*); *Moore, supra,* 550 F.2d at 1212; *Northern* v. *McGraw-Edison Co.,* 542 F.2d 1336, 1344 (8th Cir. 1976), *cert. denied,* 429 U.S. 1097 (1977). First, there must be two distinct products or services. *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 614 (1953). Second, the defendant must have sufficient economic power in the tying market to impose significant restrictions in the tied product market. *United States Steel Corp.* v. *Fortner Enterprises, Inc.,* 429 U.S. 610, 614-16 (1977) (*Fortner II*). Finally, the amount of intersttae commerce in the tied product market must not be insubstantial. *Northern*

Pacific, supra, 356 U.S. at 2; *Ungar* v. *Dunkin' Donuts of America, Inc.,* 531 F.2d 1211, 1224 (3d Cir.), *cert. denied,* 429 U.S. 823 (1976).

A. Two Distinct Products

Appellant argues that the sale of cemetery lots and the foundation preparation for grave memorials represent two separate and distinct products. While it should be noted that § 3 of the Clayton Act is inapplicable to tie-ins involving services, *Advance Business Systems & Supply Co.* v. *SCM Corp.,* 415 F.2d 55, 61 (4th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970), the installation and maintenance of a product have been found to be subject to the prohibitions against ties under the Sherman Act. *Miller* v. *Granados,* 529 F.2d 393, 396-97 (5th Cir. 1976) (condominium sale tied to management service contract held to be distinct products and services under § 1 of the Sherman Act).

Appellant asserts that the analysis in *Moore, supra,* 550 F.2d at 1212, 1214-18, is persuasive. We agree. The facts in *Moore* are analogous to those presented, and the conclusion reached by the Ninth Circuit concerning the existance of two distinct products is well reasoned. In *Moore,* the plaintiff, a retailer and installer of grave memorials, commenced a private antitrust action against a group of cemetery owners in Oregon. The cemeteries required that the buyer of a cemetery lot use the installation service of that cemetery. Some of the cemeteries required the buyer of a cemetery lot to purchase a grave marker from or through the cemetery. The plaintiff alleged that the exclusive installation policy represented tying arrangments prohibited under the Sherman Act. The district court entered judgment for all defendants. On appeal, the Ninth Circuit vacated the judgment and remanded the case for further proceedings. *Id.* at 1218. An application of the factors in *Moore* "leads inescapably to the conclusion that separate products and services are involved." *Id.* at 1215.

Separability is based not only upon the physical characteristics of the items involved but also on the business justification for selling the two products. Unless a cost savings results from the tying arrangments or the tied and tying products are typically used as a unit in fixed proportions, the tied product is often regarded as "generally different." *Id.* Appellees have failed to show that the business justifications here result in a cost savings to consumers. *See* text at pp. 20-21 *infra.* The evidence tends to show that by entering into the exclusive foundation preparation agreement appellees reduced competition rather than price.

The rules dealing with tie-ins are designed not to prohibit the sale of "physically separable" products or services, but rather to prohibit using a product in strong demand to compel the purchase of a second distinct commodity or service. *Moore, supra,* 550 F.2d at 1214. The public's demand for the ultimate product is often closely related to but legally separable from its demand for the installation of the product. *Id.* The installation of a cable television antenna system has been found to be a separate market from the sale of the components in the antenna system. *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545, 550-59 (E.D. Pa. 1960) (*Jerrold Electronics*), *aff'd,* 365 U.S. 567 (1961) (per curiam). The installation of avionics equipment has been viewed as separate from the sale of the equipment. *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.,* 460 F. Supp. 1151, 1154 n.8 (N.D. Ill. 1978), *rev'd on other grounds,* 617 F.2d 478 (7th Cir. 1980). Separate markets also exist for the assembly of automobile parts and the servicing and delivery of those parts. *Anderson Foreign Motors, Inc.* v. *New England Toyota Distributors, Inc.,* 475 F. Supp. 973, 982 (D. Mass. 1979).[7]

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[7] *Cf. Washington Gas Light Co.* v. *Virginia Elec. & Power Co.,* 438 F.2d 248, 253 (4th Cir. 1971) (where the court held VEPCO's practice of providing homebuilders with inexpensive underground service installations on condition that builders erect a primarily electricity-served home was not an unlawful tie because of the lack of two separate markets).

Appellees argue that because no companies in the market area provide foundation preparation services for cemeteries, no separate market for the service exists. Their argument fails because the exlusive foundation preparation policy virtually forecloses the existence of companies which would otherwise solely provide foundation preparation services. Further, a separate demand for a product or service may exist although no commercial entities exist that supply that service. This is especially true where a tying arrangment precludes entrance into the underserved market.

A separate market exists for the preparation of foundations for grave memorials. If given the opportunity to purchase the service separately, consumers would likely be drawn to the company offering foundation preparation services at the least expensive price.

Thus, we hold that a cemetery lot and the preparation of the foundation for grave memorials are two generic products. We next inquire whether appellees have sufficient economic power in the tying product market to impose sufficient restrictions in-the tied product market.

B. Economic Power

Among the factors cited by the Supreme Court that are relevant to our inquiry whether appellees hold sufficient economic power are (1) the unique characteristics of the tying product or its desirability to consumers, (2) the noncompetitive nature of the price sought for the tied product, (3) the volume of sales of the tied product or service (foundation preparation), and (4) the size of the companies owning and operating the tying product (cemetery lots). *See generally* Annot., 51 L. Ed. 2d 826 (1978). As to these four elements, the record reflects that appellees possessed sufficient economic power to impose an appreciable restraint on free competition.

Monopoly power or dominance in the tying market need not be shown. *Fortner I, supra,* 394 U.S. at 502; *Northern* v. *McGraw-Edison Co., supra,* 542 F.2d at 1347. Sufficient economic power exists if the supplier of the tying product has sufficient leverage in the market to increase prices or to force a significant number of buyers to accept burdensome terms. *Fortner I, supra,* 394 U.S. at 501-03.

It is unnecessary for appellant to prove by voluminous economic data that appellees have a strangle hold on the tying market. **See** Markovits, *Tie-ins, Reciprocity, and the Leverage Theory,* 76 YALE L.J. 1397 (1967). Where the sellers are of sufficient size to exert some power, control or dominance over the tying product, the threshold standard of economic power has been met. *Osborn* v. *Sinclair Refining Co.,* 286 F.2d 832, 838 (4th Cir. 1960) (*Osborn*) (illegal tying arrangement for supply of oil and machinery), *cert. denied,* 366 U.S. 963 (1961).

Summarizing the case law in the area, we find that in order to answer the question of economic power we look to whether the characteristics of the tying product are unique. For example, the statutory grant of a patent monopoly in *International Salt Co., supra,* 332 U.S. at 395-96, the copyright monopolies in *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 157-59 (1948), and *United States* v. *Loew's, Inc.,* 371 U.S. 38, 49 (1962), and the extensive land holding in *Northern Pacific, supra,* 356 U.S. at 8-12, represented tying products that the Court regarded as sufficiently unique to give rise to a presumption of economic power.

Uniqueness alone, however, is not always sufficient to infer economic power. In *Fortner II,* while the evidence showed that the credit terms offered by Fortner were unique because of Fortner's willingness to accept a lesser profit, the Supreme Court held that the unique element did not give rise to an inference of economic power in the tied market. 429 U.S. at 619-21.

Fortner II, however, is distinguishable from the case at bar. 429 U.S. at 614-16. Appellants have shown the cemetery owners have an unique economic advantage which enables them to offer a package arrangement for the burial and the supply and installation of the monuments that is signficantly differentiated from that which the manufacturer of grave memorials can offer.

It can hardly be denied that cemeteries are distinct enterprises and have a unique public function. *Moore, supra,* 550 F.2d at 1213-16. A cemetery lot, like any piece of real estate, is unique. Further, only a limited number of people have the enormous resources required to start their own cemetery. The capital cost of starting a cemetery is far greater than the cost of manufacturing monuments or markers. Also, zoning restrictions in St. Louis and its neighboring counties make the construction of a new cemetery almost prohibitive. The costs and regulations associated with opening a cemetery prevent appellant from offering the tying product in the unique manner that appellees offer it.

The Supreme Court in several cases has considered the volume of sales in determining whether a particular tying arrangement shows sufficient economic power to establish a violation of § 1 of the Sherman Act. *Fortner II, supra,* 429 U.S. at 616-20; *Northern Pacific, supra,* 356 U.S. at 7-8; *International Salt Co., supra,* 332 U.S. at 397-98.

In *Standard Oil Co.* v. *United States,* 337 U.S. 293 (1949) (*Standard Oil of California*), the Supreme Court held that control of 6.7 percent of the retail gasoline market permitted an inference of substantial economic power. More recently, a 10 percent share of the market has been seen to be sufficient economic power to establish a *prima facie* case. *Cornwell Quality Tools Co.* v. *C.T.S. Co.,* 446 F.2d 825, 831 (9th Cir. 1971) (*Cornwell Tools*) (exclusive dealing contract with territorial restrictions),

cert. denied, 404 U.S. 1049 (1972); *Osborn, supra,* 286 F.2d at 841.

The case before us falls within the quantitative analysis used in *Standard Oil of California, Osborn* and *Cornwell Tools.* The tying products in the case at bar are the cemetery lots supplied by appellees. Appellees accounted for 22 percent of the burials performed in the market area in 1978, and the exclusive foundation preparation policy, upon which appellant bases its claim, is uniformly followed by nearly all of the cemeteries in St. Louis.

The minimum percentage of market dominance required to establish economic power has never been specified; nevertheless, in deciding this case we need not define in detail the line of demarcation between sufficient and insufficient economic power. It suffices to hold that appellees' level of economic power is sufficient to fall within the broad authority of the Sherman Act.

In sum, appellant has shown that appellees hold a unique economic advantage. The volume of appellees' sales and the size of appellees' enterprises also lead to the conclusion that appellees possess sufficient economic power to impose an appreciable restraint on free competition.

C. Interstate Commerce

In any challenge based upon § 1 of the Sherman Act, the plaintiff must show that the arrangement in question did not have an insubstantial effect upon interstate commerce. *Hospital Building Co.* v. *Trustees of Rex Hospitals,* 425 U.S. 738 (1976); *Burke* v. *Ford,* 389 U.S. 320 (1967); *Harold Friedman, Inc.* v. *Thorofare Markets, Inc.,* 587 F.2d 127 (3d Cir. 1978); *Taxi Weekly, Inc.* v. *Metropolitan Taxicab Board of Trade, Inc.,* 539 F.2d 907 (2d Cir. 1976); *Lehrman* v. *Gulf Oil Corp.,* 464 F.2d 26 (5th Cir.), *cert. denied,* 409 U.S. 1077 (1972); *see generally* 1 AREEDA ANTITRUST, *supra,* ¶¶ 231-33; L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 233a (1977).

Appellees contend that their activities are purely local in nature and that if any interstate commerce was affected by the tying arrangement the amount was insignificant. We disagree.

Regardless of how local the immediate effect of an activity might be, if the activity has a substantial and adverse effect on interstate commerce, the arrangement falls within the expansive reach of the Sherman Act. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 195 (1974).

The most recent Supreme Court pronouncement of the jurisdictional requirement of interstate commerce under the Sherman Act came in *McLain* v. *Real Estate Board, Inc.*, 444 U.S. 232 (1980) (*McLain*). In *McLain*, the plaintiffs asserted that various real estate brokers, firms, and trade associations had conspired to fix real estate commissions on the sale of residential property in violation of § 1 of the Sherman Act. Both the district court and the Fifth Circuit Court of Appeals found the defendants' activities to be local in nature and without a substantial effect on interstate commerce. In reversing the Fifth Circuit, the Supreme Court held that the plaintiffs could show federal jurisdiction under the Sherman Act by "demonstrat[ing] a substantial effect on interstate commerce generated by respondent's brokerage activity." *Id.* at 242. The Court concluded that it was unnecessary to make "the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of [defendants'] activity that are alleged to be unlawful," *id.* at 242-43, when out-of-state funds, in part, were used to finance the residential properties.

The Supreme Court examines the magnitude of interstate commerce by asking "(1) whether a 'substantial' volume of interstate commerce is involved in the overall . . . operation [of cemeteries], and (2) whether the challenged activity is an essential, integral part of the transaction and inseparable from its in-

terstate aspects." *Id.* at 240 (*citing* the district opinion, 432 F. Supp. at 984, *citing Goldfarb* v. *Virginia State Bar, supra,* 421 U.S. at 778-85).

In *Northern* v. *McGraw-Edison Co.,* this court aggregated the amount of interstate commerce involved for the six-year period during which the defendant had been engaged in the allegedly illegal tie-in practices. 542 F.2d at 1346-48. Applying the aggregation principle to the case at bar, we calculate that since 1972 in excess of twelve thousand persons have purchased both monuments and foundation preparation services from appellees. The volume of business affected by the tying arrangement has been over $4,200,000 during that same period. These figures cannot be said to be insignificant or insubstantial. *See McLain, supra,* 444 U.S. at 241-45; *International Salt Co., supra,* 332 U.S. at 396.

As to the second inquiry, the record establishes that many of the markers or monuments sold by the parties since 1972 were purchased from outside the state of Missouri. The total amount of such purchases was in excess of one million dollars. The purchase of grave markers and monuments is clearly "an integral part" of the transaction; and because of the "inseparability" of the purchase of markers from the overall operation of a cemetery, we hold that the enterpirses affected by tying arrangements were within the stream of interstate commerce regulated by the Sherman Act. *McLain, supra,* 444 U.S. at 243.

In addition, in making an inquiry into the effect upon interstate commerce of a tying arrangement, the court can look to the future and reasonably assume that appellees will continue in business for an undetermined period of time and that business will continue, and possibly increase, in the future. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321, 338-42 (1971).

Thus, we hold that the amount of interstate commerce affected by the tie is not insubstantial or *de minimis. McLain,*

supra, 444 U.S. at 245; *Fortner I, supra,* 394 U.S. at 501; *Moore, supra,* 550 F.2d at 1216.

We have held that (1) appellees have tied two separate and distinct products into a single package, (2) appellees possess sufficient economic power to appreciably restrain competition, and (3) the tying arrangements involve a not insubstantial amount of interstate commerce. Our inquiry does not stop here, however, because we must finally examine whether appellees advance any compelling business justification for their use. *Susser* v. *Carvel Corp.,* 332 F.2d 505, 519 (2d Cir. 1964), *cert. dismissed,* 381 U.S. 125 (1965).

D. **Justification**

Tying arranagements are valid if they can be shown to protect a legitimate antitrust interest. *See generally* Turner, *The Validity of Tying Arrangements Under the Antitrust Laws, supra,* 72 HARV. L. REV. at 59; Comment, *Tying Arrangements Under the Antitrust Laws: The "Integrity of the Product" Defense,* 62 MICH. L. REV. 1413 (1964). To successfully assert this defense appellees must show that (1) there are other public interests that are served by the practice in question; (2) those interests cannot be served by a less restrictive alternative; and (3) the contribution made by the restrictive practice is not outweighed by the harm to competition. *See Standard Oil of California, supra,* 337 U.S. at 306; *Moore, supra,* 550 F.2d at 1217-18.

Tying arrangements have been justified when a defendant proves that a substitute for the tied product must comply with such precise and detailed specifications that other manufacturers may not be able to market a product functionally compatible with the tying product. *Standard Oil of California, supra,* 337 U.S. at 306; *International Salt Co., supra,* 332 U.S. at 397-98. Another justification exists when a small company has been compelled to use tying arrangements to scale high barriers of entry into a new capital intensive market. *Jerrold Elec-*

tronics, supra, 187 F. Supp. at 557; *see also Brown Shoe Co.* v. *United States,* 370 U.S. 294, 330 (1962).

To justify their tying arrangement appellees argue that all the cemeteries in St. Louis have a perpetual statutory duty to maintain the quality of their lots. Appellees contend that property owners who sell a limited interest in land which they are required to maintain in perpetuity should be able to perform exclusively services incidental to that sale when such services affect its ownership interest and future obligations. We disagree.[8]

There are a number of less onerous methods that appellees can use to protect their legitimate property interest. The record contains evidence that shows the Cemetery Management Association on several occasions discussed preparing quality specification guidelines for foundation preparation and memorial placement. The adoption of quality guidelines in this instance would clearly be in the public interest.

We also point out that our decision in favor of multiple entry into the market for foundation preparation and placement of grave markers should not be interpreted as a policy of unlimited

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[8] In many industries, including cable television, common carrier and condomium industries, owners or licensees retain the obligation to serve all classes of customers with technical integrity and quality service. The cable television operator must give a commitment to provide the community with quality service throughout the life of the franchise. The telephone industry must maintain the integrity of their system, but the FCC has continued to gradually liberalize tariffs on customer installed equipment. *Network Project* v. *FCC,* 167 U.S. App. D.C. 220, 511 F.2d 786, 797 (1975); *Hush-A-Phone Corp.* v. *United States,* 99 U.S. App. D.C. 190, 238 F.2d 266, 268 (1956). *See also* Johnson, *Boundaries to Monopoly and Regulation in Modern Telecommunications,* in COMMUNICATIONS FOR TOMORROW 127, 133 (G. Robinson ed. 1978). Thus, the continued obligation to maintain does not, without more, present an ample justification for the existence of a predicate tying arrangement.

or unrestricted open entry. Our aim, as outlined above, is to afford concerns a reasonable opportunity to demonstrate the public advantages in increasing the number of firms that manufacture, prepare foundations, install and service grave markers and foundations. Because a *per se* tying arrangement has been found, appellees have the burden of showing that the system of competition will become unmanageable and that the foundations prepared or markers installed by their private competitors will detract from the appearance or decrease the general services rendered the public. No such showing has been made; thus appellees' justification is unwarranted.

III. REMEDY

Appellant sought treble damages and injunctive relief in the district court. The burden of proving the legal requisites of such relief was at all times on appellant as the plaintiff below. The district court, after a ten-day trial, found that "[appellant] was not injured by the Rule" (in essence, the tying arrangement), that "[appellant] was not damaged in any amount capable of ascertainment by this Court," and that "[appellant's] evidence of damages was wholly speculative." 505 F. Supp. at 530. We read the district court's opinion as holding that appellant failed to meet the burden of proving the fact of damage as well as the amount of damages. The district court's findings of fact cannot be disturbed on appeal unless "clearly erroneous." *See* Fed. R. Civ. P. 52(a); *e.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* 395 U.S. at 123. With this standard in mind, we now discuss appellant's claims for damages and injunctive relief.

A. Damages

A plaintiff seeking treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15, must establish an antitrust violation, the fact of damage of injury, a causal relationship between the

violation and the injury, and the amount of damages. *See, e.g., Paschall* v. *Kansas City Star Co.*, 605 F.2d 403, 407-08 (8th Cir. 1979); *Admiral Theatre Corp.* v. *Douglas Theatre Co., supra,* 585 F.2d at 893; *see generally* L. SULLIVAN, ANTITRUST § 251 (1977); 15 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 115.02 (1981). Initially one must prove the *fact* of damage "to a reasonable certainty," *Admiral Theatre Corp.* v. *Douglas Theatre Co., supra,* 585 F.2d at 893, and then prove the *amount* of the damage to the extent that it is "capable of reasonable ascertainment and . . . not . . . speculative or conjectural." *Id.*

"[T]here is a clear distinction between the measure of proof necessary to establish the fact that [appellant] had sustained some damage and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). "[Appellant's] burden of proving the fact of damage under § 4 of the Clayton Act is satisified by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum pont goes only to the amount and not the fact of damage." *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* 395 U.S. at 114 n.9.

> Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

Id. at 123.

We conclude that the district court's finding that appellant failed to prove the *fact* of damage is clearly erroneous. Appellant's evidence was sufficient to support the inference that appellant had in fact been injured by appellees' exclusive foun-

dation preparation policy. The tying arrangement employed by appellees effectively excluded appellant from the market for the sale, preparation, and installation of monument foundations.

The district court further found that appellant failed to prove the *amount* of damage. There were three "theories" of recovery submitted to the district court. Theories two and three were dependent on the validity of theory one; thus, only theory one needs to be discussed here. Recovery under theory one was based on the overcharge that appellant allegedly paid appellees for foundation preparation since 1974. Appellant sought to prove that it could have prepared foundations at a lower cost than the price charged by appellees. Thus, appellant sought to measure the damages caused by its exclusion from the foundation preparation market by establishing loss of sales and lost profits.

In an effort to show that it could beat appellees' foundation preparation charges, appellant introduced evidence of numerous time studies of foundation preparation and installations which calculated the costs of labor and materials. Based on these studies, appellant claimed that it could prepare certain foundations and install memorials for under $20 as opposed to the $75 price charged by one of appellees. Tr. at 342. These time studies were attacked by appellees, however, on the basis that appellant failed to take into account the different soil conditions at the various cemeteries, the resulting increases in administrative costs, and the possible need for new equipment and additions to their labor force. Appellees sought to undermine the accuracy and sufficiency of appellant's proof of damages.

Resolution of such conflicts in evidence is properly left to the district court, and here they were resolved in favor of appellees. The district court found that "[c]omparison of [defendants'] charges with plaintiff's incredible estimates and promises [was] meaningless." 505 F. Supp. at 528. The district court further found that "plaintiff was not damaged in any amount capable

of ascertainment by this Court" and that "[p]laintiff's evidence of damages was wholly speculative." *Id.* at 530.

We have reviewed the record and cannot say that the district court's finding that appellant simply failed to satisfy its burden of proof as to the *amount* of damages is clearly erroneous. We therefore affirm the denial of damages. An award of damages may not be based upon mere speculation. However, appellant's evidence was insufficient only as to the measurement of damages. As discussed above, appellant established that it had been excluded from the foundation preparation market by the tying arrangement (the exclusive foundation preparation and installation policy). Under the circumstances, we think an award of nominal damages is justified and remand to the district court with directions to award appellant nominal damages in the amount of $3.

B. Injunctive Relief

The standard for the granting of injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26, is somewhat different from the standard for the award of damages. In the injunction context, once a determination has been made that the defendant has violated the antitrust laws, a plaintiff need only demonstrate a "threatened loss or damage" growing out of the violation, 15 U.S.C. § 26. Injunctive relief, therefore, is "available even though the plaintiff has not yet suffered [or proved] actual injury; [the plaintiff] need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* 395 U.S. at 130 (citation omitted). In the case at bar there has been an antitrust violation, and due to the nature of that violation we conclude that appellant is entitled to injunctive relief as a mater of law.

It is beyond cavil that the tying arrangement employed by appellees has had the effect of excluding appellant from the market for the sale, preparation, and installation of monument

foundations. This exclusion of appellant from the market, in our view, represents a "threatened loss or injury" sufficient to require injunctive relief. A similar situation was considered by the Supreme Court in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*:

> Judged by the proper standard, the record before us warranted the injunction . . . . The findings of the District Court were that [the defendants] were conspiring to exclude Zenith and others from the . . . market; there was nothing indicating that this clear violation of the antitrust laws had terminated or that *the threat to Zenith inherent in the conduct* would cease in the foreseeable future.

395 U.S. at 131 (emphasis added). In the present case the threat inherent in the conduct is even more immediate where, by the very terms of the tying arrangement, appellant is excluded, in fact, from the relevant market. Accordingly, the district court's denial of injunctive relief is reversed, and this portion of the cause is remanded to the district court for formulation of an appropriate order. Appellees, individually or through the Management Association, are free to propose and adopt reasonable rules and guidelines with respect to the foundation preparation and installation of monuments by third parties.

C. Attorney's Fees

Appellant is entitled to reasonable attorney's fees and costs. 15 U.S.C. §§ 15, 26 (as amended in 1976). This matter is remanded to the district court for determination.

Affirmed in part, reversed in part, and remanded with directions.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1963

September Term, 1981

Rosebrough Monument Company,
Appellant,

vs.

Memorial Park Cemetery Association, a corporation, et al,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause was heard on a designated record from the United States District Court for the Eastern District of Missouri and on briefs of the respective parties and was argued by counsel.

After consideration, it is now ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, reversed in part and remanded to the said District Court for proceedings consistent with the opinion of this Court.

December 9, 1981

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1981

No. 81-1963

Rosebrough Monument Company,
Appellant,

vs.

Memorial Park Cemetery Association, etc., et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

The Court, having considered appellees' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

February 9, 1982

Opposition

1

No. 81-1931

Office - Supreme Court, U.S.
FILED
MAY 17 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MEMORIAL PARK CEMETERY ASSOCIATION, a corporation; VALHALLA CEMETERY, CREMATORY AND MAUSOLEUM CO., a corporation; LAKE CHARLES MEMORIAL PARK, INC., a corporation; ALEXANDER & SONS, INC., a corporation; d/b/a MT. LEBANON CEMETERY AND MAUSOLEUM; LAKEWOOD PARK CEMETERY, INC., a corporation; SUNSET BURIAL PARK, INC., a corporation; STANZA & COMPANY, INC., a corporation; d/b/a OAKGROVE CEMETERY; LAUREL HILL MEMORIAL GARDENS, INC., a corporation; MASON SECURITIES COMPANY, d/b/a HIRAM CEMETERY; MT. HOPE CEMETERY AND MAUSOLEUM COMPANY, a corporation; SOUTHERN SECURITIES COMPANY, a corporation, d/b/a PARK LAWN CEMETERY,
Petitioners,

v.

ROSEBROUGH MONUMENT COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MEMORIAL PARK CEMETERY ASSOCIATION, a corporation; VALHALLA CEMETERY, CREMATORY AND MAUSOLEUM CO., a corporation; LAKE CHARLES MEMORIAL PARK, INC., a corporation; ALEXANDER & SONS, INC., a corporation; d/b/a MT. LEBANON CEMETERY AND MAUSOLEUM; LAKEWOOD PARK CEMETERY, INC., a corporation; SUNSET BURIAL PARK, INC., a corporation; STANZA & COMPANY, INC., a corporation; d/b/a OAKGROVE CEMETERY; LAUREL HILL MEMORIAL GARDENS, INC., a corporation; MASON SECURITIES COMPANY, d/b/a HIRAM CEMETERY; MT. HOPE CEMETERY AND MAUSOLEUM COMPANY, a corporation; SOUTHERN SECURITIES COMPANY, a corporation, d/b/a PARK LAWN CEMETERY,
Petitioners,

v.

ROSEBROUGH MONUMENT COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Respondent, Rosebrough Monument Company ("Rosebrough"), submits the following statement of facts to correct certain omissions and misstatements in the Statement of the Case in Petitioners' Brief. These facts are undisputed and formed the basis upon which the Eighth Circuit rendered its Opinion.

Rosebrough is a company engaged (in the greater St. Louis metropolitan area) in the sale, manufacture, installation and service of grave monuments and markers (Tr. 58, 59; Op. p. 1136).[1] Petitioners are private, non-sectarian, for profit, endowed care cemeteries located in the greater St. Louis metropolitan area. Each of Petitioners competes with Rosebrough, in each of their respective cemeteries, in the sale of markers and monuments (Tr. 58, 66, 793, 794, 918, 967, 1068, 1198, 1127; Op. p. 1136).

For many years Petitioners have had in force a rule requiring that only the cemetery in which a marker or monument is to be placed may prepare and install the foundation for such monument or marker (Tr. 65, 793, 794, 918, 967, 1068, 1198, 1127, Op. p. 1136). As a result of such rule, Rosebrough and the other monument companies have been prohibited from preparing and installing the foundations for the markers and monuments which they have sold for placement on the Petitioners' cemetery lots (Tr. 66, Op. p. 1136).

Even though Rosebrough is not permitted to prepare and install the foundations in Petitioners' cemeteries, it is permitted to perform certain limited service functions in such cemeteries. In Petitioner Sunset Burial Park's cemetery, Rosebrough is permitted to place markers and monuments on the foundation that has been prepared and installed by such cemetery (Tr. 66, Op. p. 1136). In the cemeteries of the other Petitioners, Rosebrough is only permitted to place monuments on the foundation that has been prepared and installed by such Petitioners' cemeteries. The reason that these Petitioners allow Rosebrough to place monuments on the foundations prepared and installed by them is that they do not have the heavy equipment necessary to place

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[1] Citation to pages of the Opinion of *Rosebrough Monument Co. v. Memorial Park Cemetery Association*, 666 F.2d 1130 (8th Cir. 1981)

the same on such foundations, and Rosebrough does. However, in view of the fact that the markers are of light weight and require no special equipment, the Petitioners reserve exclusively to themselves the function of placing the marker on the foundation prepared by them (Tr. 1288, 1289, Op. p. 1136).

The uncontradicted evidence established that, in performing these permitted limited service functions, Rosebrough has never violated any of the rules of the cemeteries (Tr. 891, 906, 907, 908, 1066, 1191, 1244, 1288). Similarly, the uncontradicted evidence established that, in performing these service functions, Rosebrough has never damaged any property in the cemeteries nor has it interfered with any burial service being conducted thereat (Tr. 1191).

Although Petitioners have not allowed Rosebrough to perform foundation installation services, Rosebrough, over the years, has prepared and installed foundations for thousands of all types of markers and monuments in cemeteries other than those of Petitioners (i.e., in churchyards and outlying cemeteries), all without any complaint (Tr. 63, 68, 287-290, 294, 324).

In the sale of markers or monuments, whether by Petitioners or by monument companies such as Rosebrough, the ultimate sale price always includes the foundation installation charges. One is not marketed without the other (Tr. 237, 881, 1300, 1371, 1372, Op. p. 1144). Thus, as a result of the Petitioners' exclusionary rule heretofore described, a monument company must include in its total sale price of a marker or monument the charge of the Petitioner's cemetery to the monument company for the foundation and the installation of the same (Tr. 235, Op. p. 1136). The memorial is sold with the foundation service included as one package (Tr. 116, 881). The foundation service is not a part of the transaction when a cemetery lot is sold (Tr.

237, 881, 1300, 1371, 1372, Hannebaum deposition[2], p. 27, McDermott deposition, p. 20).

All of the markers and monuments sold by Petitioners in their respective businesses are purchased from outside the State of Missouri. The total amount of the purchases for the years 1973 through 1978 was in excess of $519,000 (Pltf. Ex. 65). In fact, since 1972, in excess of 12,000 persons have accepted the tie-in arrangements in Petitioners' cemeteries, expending a total in excess of $4,200,000 for markers or monuments and the installation of foundations with respect thereto (Stipulation of Uncontested Facts, Schedule "C", Op. p. 1144).

Reasonable quality control standards for memorial installations can be formulated. The Petitioners, excluding Petitioner Memorial Park, belong to a Cemetery Management Association (Op. p. 1137). Shortly after the Ninth Circuit Court of Appeals rendered an opinion in *Moore* v. *Jas. H. Matthews & Company*, 550 S. 2d 1207 (9th Cir. 1977), the aforesaid Cemetery Management Association members met for the purpose of preparing uniform standards of rules and regulations to be used by monument companies for the installation of foundations in the Petitioners' cemeteries, anticipating that they would have to stop their exclusionary foundation practice as a result of said opinion (Cliff Zell deposition, pp. 21, 22-25; Van Deventer deposition, pp. 16, 17; McLaughlin deposition, pp. 49, 52, Op. p. 1145). Most of Petitioners submitted, as part of the evidence at trial, an exhibit giving their foundation specifications (Def. Valhalla Ex. Q, Tr. 871; Def. Mt. Hope Ex. R, Tr. 997; Def. Park Lawn Ex. Q, Tr. 1065; Def. Hiram Ex. R, Tr. 1091; Def. Lake Charles and Laurel Hill Ex. Q, Tr. 1148; Def. Lakewood Ex. Q, Tr. 1180; Def. Oak Grove Ex. T, Tr. 1215; Def. Sunset Park Ex. P, Tr. 1242). The preparation of a foundation for a marker

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[2] The depositions of all of the parties were received into evidence by the Court, but were not assigned any exhibit numbers (Tr. 141).

basically requires the digging of a four inch deep hole the size of the marker and either laying the marker in the dirt hole or placing some sand therein first. The preparation of the larger monument foundation consists only of centering the hole on the cemetery lot, digging the hole and pouring concrete into that hole (Tr. 1100, 1154, 1248, 1284, 1296). In fact, almost 80% to 90% of all memorials now placed in cemeteries are markers (rather than monuments). Therefore, 80% to 90% of the installations require only the digging of a four inch deep hole the size of the marker (Tr. 883, 918, 991, 1078, 1152, 1184, 1218).

The Petitioners' tie-in practices have had a dramatic negative effect on sales by Rosebrough of markers and monuments in Petitioners' cemeteries. For example, from 1957 (the year of the formation of the Cemetery Management Association) to 1978, Rosebrough's sales of markers and monuments in Petitioners' cemeteries in relation to Rosebrough's total sales dropped from 25.27% to 9.13% (Pltf. Ex. 97, Tr. 711). Since 1960, each time that Petitioners' cemeteries increased their foundation charges to Rosebrough, such increases resulted in an immediate drop in sales of markers and monuments by Rosebrough in those cemeteries (Pltf. Exs. 58-63, Tr. 719, Pltf. Ex. 98, Tr. 712).

SUMMARY OF THE ARGUMENT

In the case at bar, the Eighth Circuit held that Petitioners' rule which ties the purchase of a cemetery lot (tying product) with the requirement that the buyer use the foundation service of the cemetery (tied product) is in violation of Section 1 of the Sherman Act. *Rosebrough Monument Co.* v. *Memorial Park Cemetery,* 666 F.2d 1130 (8th Cir. 1981). That opinion is in total harmony with the Ninth Circuit opinion in *Moore* v. *Jas. H. Matthews & Company,* 550 F.2d 1207 (9th Cir. 1977), wherein the exclusionary practices of cemeteries identical in all respects to the case at bar were found to constitute an illegal tying arrangement. There is no conflict of opinions between the Circuits involved in this case.

Petitioners contend that a Writ of Certiorari should be granted herein because this Court has never enunciated clear guidelines for determining if there exists a single product or separate products in anti-trust tying cases. However, as will be demonstrated hereinafter, the Supreme Court has established clear and detailed guidelines for the courts to follow in deciding the "number of products" issue in tying cases.

Petitioners also contend herein that this Court has not established guidelines respecting the "business justification" as a defense in anti-trust tying cases. Again, Petitioners are in error. The Supreme Court, as will be shown hereinafter, has already provided detailed and lucid principles to guide the courts when considering business justification defenses in this area of law.

Petitioners further allege herein that the Eighth Circuit departed from established law in determining that there was a "not insubstantial" amount of interstate commerce affected in the tied product. They claim that the tied product herein is the foundation installation services performed in local cemeteries and therefore, no interstate commerce whatsoever is involved. However, the Eighth Circuit was correct in its decision herein for the reason that the undisputed evidence is that the foundation installation service that is performed in a local cemetery is, in the real business world, inseparably connected to the sale of a marker or monument. The undisputed evidence herein established that the markers and monuments involve a very substantial amount of interstate commerce in this case. The foundation installation service and the marker or monument are one single package. Therefore, the Eighth Circuit's decision, which is identical with the Ninth Circuit's decision in the *Moore* case, *supra,* in this respect (and in all other respects) properly determined that there was the requisite effect on interstate commerce herein.

Finally, Petitioners contend that the Eighth Circuit violated standards of judicial review in reversing the lower court's conclusion that there was no conspiracy herein. However, as demonstrated more fully hereinafter, the Eighth Circuit did not disregard the "clearly erroneous" standard of review set forth in Rule 52(a) of the Federal Rules of Civil Procedure when it determined, basd upon undisputed facts, that as a matter of law a conspiracy existed among the Petitioners herein. There was no change in any finding of fact. The Eighth Circuit merely reversed the District Court as to a conclusion of law applied to undisputed facts.

ARGUMENT

I

The Court Below Followed Clearly Articulated Standards Of This Court And Standards Approved By This Court In Deciding The Number Of Products Issue In This Case.

The first inquiry which has to be resolved in determining whether there exists an illegal tying arrangement is a determination whether two distinct products or services are involved. *Times-Picayune Publishing Company* v. *United States,* 345 U.S. 594, 614 (1953). The Eighth Circuit, in the case at bar, found that there are two products herein, namely the cemetery lots (tying products) and the foundation preparation for grave markers and monuments (tied product). This conclusion of the Eighth Circuit is identical to the conclusion of the Ninth Circuit in *Moore* v. *Matthews,* 550 F.2d 1207 (9th Cir. 1977), which found a tying arrangement identical to the one in the case at bar to be in violation of the Sherman Act.

In their Petition for a Writ of Certiorari, Petitioners allege that (i) there are no standards enunciated by this Court which would guide the lower courts in making the determination whether one or two products are involved; and (ii) the Eighth Circuit misapplied the standards which do exist. However, Petitioners are wrong in each of their contentions. In fact, the Eighth Circuit Opinion cites the case of *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545 (E.D.Pa. 1960), *af'd per curiam* 365 U.S. 567, 81 Sup. Ct. 755, 5 L.Ed.2d 806 (1961), which provides practical standards for the number of products issue. The *Jerrold* case treats within its analysis the three separate tests identified in Petitioners' Brief, which Petitioners allege were misapplied by the Eighth Circuit.

In *United States* v. *Jerrold Electronics Corp., supra,* this Court established guidelines to be used in determining whether a single product or multiple products are involved. Such guidlines are: (i) whether other members of the industry sell the products separately; (ii) whether various components of the alleged single product differ in significant respects; (iii) whether the customer is charged separately for the products; and (iv) whether any components of the alleged single products are sold separately, *Id,* at 559.

The leading circuit court decision on this issue after *Jerrold* is *Seigel* v. *Chicken Delight, Inc.,* 448 F.2d 43 (9th Cir. 197), *cert. den.* 405 U.S. 955 (1972). In that case the Ninth Circuit drew upon the principles established in *Jerrold* in its analysis of the number of products issue. Also *Jerrold* is cited as authority in *Moore* in connection with the number of products issue.

In employing these Supreme Court approved tests, the Eighth Circuit herein considered the fact that cemetery lots are commonly bought separately from grave markers and installation of markers and that cemetery lots may be bought years in advance of burial without the purchase of grave markers or installation services (Tr. 237, 881, 1300, 1371, 1372, Hannebaum deposition, p. 27, McDermott deposition p. 20, Op. p. 1136). The undisputed evidence considered by the court below further showed that cemeteries charged separately for the cemetery lots, for the grave markers, for the installation of the grave markers and even imposed a maintenance or care fee for grave markers which was separate from the cemetery lot perpetual maintenance fee (Tr. 1044, 1082, 1089, 1094, 1125, 1166, 1216, 1235). The Eighth Circuit further clearly determined that the reason that no one sells exclusively the foundation installation services is because of the exclusionary foundation preparation policy of the Petitioners which forecloses the existence of companies which would otherwise provide such services. Virtually all of the cemeteries of any size in the metropolitan St. Louis area have the same exclusionary rule (Tr. 953, Op. p. 1142).

Applying such facts to the aforesaid guidelines, the Eighth Circuit reached the same conclusion with respect to the two products question as did the Ninth Circuit in *Moore, supra.* Specifically, the Eighth Circuit stated:

> "An application of the factors in Moore [the same as the elements listed in *Jerrold*] 'leads inescapably to the conclusion that separate products and services are involved.' " (Op. p. 1141).

There can be no doubt but that, contrary to Petitioners' assertions, the Eighth Circuit herein and the Ninth Circuit in *Moore, supra,* both of which reached the same conclusion on the same facts, applied the standards acceptable to this Court and accepted by other courts of other jurisdictions. This Court has established clear and detailed guidelines. Those guidelines have been followed herein.

II.

The Court Below Followed Clearly Articulated Standards Of This Court And Standards Approved By This Court In Considering The Business Justification Defense Of Petitioners Herein.

This Court has held that tying arrangements are valid if they can be shown to protect a legitimate competitive interest. *Standard Oil Company* v. *United States,* 337 U.S. 293 (1949). The Eighth Circuit herein found that the Petitioners did not prove any facts to support the business justification defense and held, as a matter of law, that there are less onerous methods that Petitioners can use to protect whatever legitimate property interests they may have.

Petitioners contend in their Brief that the lower Federal courts are in need of guidelines in determining when business justification will preclude a finding of liability in a tying situa-

tion. They cite various cases which, based upon their unique facts, found that business justification was either a valid or an invalid defense. Petitioners deduced therefrom that there is no single test available in making such determination. However, Petitioners are incorrect in making such conclusion, as this Court, in *Standard Oil Company* v. *United States,* 337 U.S. 293 (1949) did in fact establish three criteria which must be met to establish a successful assertion of the business justification defense. Such criteria set forth in *Standard Oil Company, supra,* are as follows: (i) there are other public interests that will be served by the practice in question; (ii) those interests cannot be served by a less restrictive alternative; and (iii) the contribution made by the restrictive practice is not outweighed by the harm to competition. The facts before the court in *Rosebrough, supra,* and also before the court in *Moore, supra,* simply did not meet the aforesaid requirements.

The Eighth Circuit, as did the Ninth Circuit in *Moore, supra,* found that there are a number of less onerous methods that Petitioners can use to protect their legitimate property interests (Op. p. 1145, *Moore,* p. 1217). The Eighth Circuit pointed to the record in this case which shows that on several occasions the Cemetery Management Association discussed preparing quality control specification quidelines for foundation preparation and memorial placement (Van Deventer deposition, p. 17, Tr. 1150-1151, Op. p. 1145). The Eighth Circuit concluded that the adoption of quality control guidelines in this instance would clearly be in the public interest and may lead to an increasing number of firms that manufacture and prepare foundations and install and service grave markers and foundations (Op. p. 1146).

Petitioners claim that to allow Rosebrough to prepare foundations for markers or monuments would detract from the appearance of the cemetery or impair its operations. The Eighth Circuit held that Petitioners' claim in this regard must fail. The Eighth Circuit herein and the Ninth Circuit in *Moore, supra,* held that the cemeteries may prepare reasonable rules and

specifications relating to the installation of memorials which will give ample protection from unqualified installers and which will prevent improper installations (Op. p. 146). Petitioners themselves prepared such rules and specifications when the Ninth Circuit rendered its opinion in Moore, *supra,* (Van Deventer deposition, p. 17, Tr. 1150-51). The Eighth Circuit held that such reasonable rules and specifications are preferable to tying arrangements which eliminate Rosebrough from the market (Op. p. 1146).

This conclusion is in full accord with this Court's holding in *Standard Oil, supra,* wherein this Court held:

> "The only situation . . . in which the protection of goodwill may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied." At p. 306.

The Eighth Circuit's opinion herein, as mentioned before, is in absolute accord with *Moore,* relative to the business justification defense. On nearly identical facts, the Ninth Circuit Court of Appeals in *Moore* held, with regard to those cemeteries' business justification defense, as follows:

> "Appellees have offered no single reason why the Lane County cemeteries could not provide reasonable guidelines and specifications for the markers to be used and the practices to be followed during installation which would not diminish the appellees' concern for the need to maintain neat, attractive grounds. Quite simply, there are far less restrictive alternatives available than a tying arrangement to effect the cemeteries' legitimate goals." (550 F.2d 1207 at page 1217).

Moore cited and relied heavily upon the case of *Seigel* v. *Chicken Delight, Inc.,* 448 F.2d 43 (9th Cir. 1971), *cert. den.* 405 U.S. 955 (1972). In *Seigel, supra,* the Ninth Circuit applied the above-quoted guidelines set by this Court in *Standard*

Oil of California v. *United States, supra,* wherein a franchisor argued that an agreement requiring franchisees to purchase equipment, mixes and packaging from the franchisor was ancillary to the legitimate business purpose of protecting good will through quality control. The Ninth Circuit rejected such argument when it found that quality control and the franchisor's good will could be amply protected by specifications. Therefore, not only did the Eighth Circuit herein follow standards promulgated by this Court in *Standard Oil, supra,* but it also followed opinions of other circuits which have applied the *Standard Oil* criteria.

Petitioners contend that the Eighth Circuit misapplied the guidelines relating to the business justification defense when it discussed, at page 1141 of its opinion, the fact that there was not shown to be any cost savings to the consumer through the tying arrangement. However, Petitioners miss the point. The Eighth Circuit simply stated that Petitioners, in presenting their business justification defense at trial, failed to show any cost savings to the customer and that fact is relevant to a determination of the number of products issue. The Court considered the fact that there was no cost savings to be a factor showing, together with other undisputed facts, that there was more than one product involved.

III

The Eighth Circuit Decision That The Amount Of Interstate Commerce In The Tied Product Market Was Not Insubstantial Conforms In All Respects To Prior Decisions Of This Court Treating This Issue.

Another element which must be proven in order to establish the illegality of a tying arrangement is that the amount of interstate commerce in the tied product market must not be insubstantial. *Northern Pacific Railroad* v. *United States,* 365 U.S.

1, 2 (1958). With respect to this issue, the Eighth Circuit herein again followed the opinion of the Ninth Circuit in *Moore* and found that, since installation services (tied product) are inextricably bound to the sale of the monuments and markers, the aggregate amount of such sales may be looked at to determine whether a substantial amount of interstate commerce is involved (Op. p. 1144).

Petitioners allege that such determination by the Eighth Circuit is improper because the Eighth Circuit should have limited its inquiry with respect to the amount of commerce involved solely to the installation services and not to the combination of such services with the amount of sales of monuments and markers. They make this argument even though, as was stated above, it was undisputed from the evidence, and the Eighth Circuit recognized such, that the foundation services and the monuments and markers are inseparably united into one package (Tr. 237, 881, 1300, 1371, 1372, Hannenbaum deposition p. 17, McDermott deposition p. 20, Op. p. 1144). They are sold as one package. The foundation charge is always included with the memorial. It would not be feasible to sell and market memorials without including the installation service as part of the package (Tr. 116, 881).

The Eighth Circuit, in its determination of this element of the tying arrangement, followed the tests enunciated by this Court in *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969) and adopted by *Moore, supra,* at 1216. This text is as follows:

> ". . . Normally the controlling consideration is simply whether a total amount of business, substantially enough in terms of dollar-volume so as not to be merely *de minimis,* is foreclosed to competitors by the tie, for as we said in International Salt, it is 'unreasonable, per se, to foreclose competitors from any substantial market by a tying arrangment . . .' " *Fortner,* at page 501.

Thus, the aforesaid test gave both the Eighth Circuit and the Ninth Circuit the authority to recognize the business realities and focus not only on the installation services but on the sales of monuments and markers which are inextricably connected with the installation service.

Although Petitioners maintain their argument that the tying involved herein only tangentially affects interstate commerce since the installation services are of a local nature, this Court has long put such contention to rest when it stated that, regardless of how local the immediate effect of an activity might be, if the activity has a substantial and adverse effect on interstate commerce, the arrangement falls within the expansive reach of the Sherman Act. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 195 (1974).

The analysis of this element of the tying arrangement made by the Eighth Circuit closely follows the Ninth Circuit decision in *Moore* and conforms in all respects to the decisions of this Court pertaining to this issue.

VI

The Eighth Circuit Applied A Correct Standard Of Review When It Reversed The District Court's Conclusion That No Conspiracy Existed.

The Petitioners contend that the Eighth Circuit was prohibited from finding the existence of a conspiracy among the Petitioner cemeteries because the District Court found that such conspiracy did not exist. To the contrary, the Eighth Circuit did not reverse the findings of fact of the District Court; rather, it determined that the District Court applied an improper standard of law to essentially undisputed facts. Such reversal of findings of a court is in accord with the decisions of this Court in *United States* v. *Parke Davis & Company*, 362 U.S. 29 (1960); *United States* v. *DuPont deNemours & Company*, 353 U.S. 586

(1957); and *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966). These cases held that the clearly erroneous rule has no application when the Appellate Court rejects a question of law, namely, whether the District Court applied an erroneous standard to essentially undisputed facts.

The Eighth Circuit applied the laws of conspiracy to the essentially undisputed facts which showed that the Petitioners, all but one of which are members of the Cemetery Association, not only jointly promoted, adopted and maintained the exclusionary foundation rule, but also exchanged information regarding foundation charges and foundation standards and other such business information to assure that the rule was enforced. With such undisputed evidence in the record, the Eighth Circuit properly found that a conspiracy to unreasonably restrain competition exists (Pltf. Ex. 13, 13A, 13B, Tr. 133, Cliff Zell deposition, pp. 21-25, Van Deventer deposition p. 16, McLaughlin deposition, pp. 49-52). The Eighth Circuit stated that:

> "When the substantial evidence leads to the conclusion that concerted or collaborative action has been contemplated and undertaken by competitors with the purpose and effect of eliminating competition among themselves and from others, a Sherman Act violation has been committed." *Rosebrough,* at p. 1140.

This conclusion of law is fully supported by numerous opinions of this Court. See *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 221-27 (1939); *United States* v. *Griffith,* 334 U.S. 100, 105 (1948); *United States* v. *General Motors Corp.,* 384 U.S. 127, 142-43 (1966).

It is clear that the Eighth Circuit in *Rosebrough* did not reverse the findings of fact of the District Court but reversed the conclusions of law as applicable to the undisputed facts. In doing so, no error was committed.

CONCLUSION

Petitioners, in their Petition for a Writ of Certiorari, have presented no grounds for this Court to exercise its discretionary jurisdiction to review the Eighth Circuit Opinion in *Rosebrough Monument Company* v. *Memorial Park Cemetery Association,* 666 F.Supp. 1130 (8th Cir. 1981). The aforesaid opinion does not conflict with any decision of any other Federal Court of Appeals. To the contrary, said decision of the Eighth Circuit is in complete harmony with the Ninth Circuit decision in *Moore* v. *Jas. H. Matthews & Company,* 550 F.2d 1207 (9th Cir. 1977), which case arose out of nearly identical facts as the case at bar.

As set forth hereinabove, this Court has previously established clear and concise guidelines for lower courts to apply in determining the number of products issue and in determining the validity of a business justification defense in antitrust tying cases. The Eighth Circuit properly made its conclusions of law that the tying arrangement here involved had the requisite effect upon interstate commerce and that a conspiracy among Petitioners existed.

For all of the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit herein should be denied.

Respectfully submitted,

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MEMORIAL PARK CEMETERY ASSOCIATION, a corporation; VALHALLA CEMETERY, CREMATORY AND MAUSOLEUM CO., a corporation; LAKE CHARLES MEMORIAL PARK, INC., a corporation; ALEXANDER & SONS, INC., a corporation, d/b/a MT. LEBANON CEMETERY AND MAUSOLEUM; LAKEWOOD PARK CEMETERY, INC., a corporation; SUNSET BURIAL PARK, INC., a corporation; STANZA & COMPANY, INC., a corporation, d/b/a OAKGROVE CEMETERY; LAUREL HILL MEMORIAL GARDENS, INC., a corporation; MASON SECURITIES COMPANY, d/b/a HIRAM CEMETERY; MT. HOPE CEMETERY and MAUSOLEUM COMPANY, a corporation; SOUTHERN SECURITIES COMPANY, a corporation, d/b/a PARK LAWN CEMETERY,

Petitioners,

vs.

ROSEBROUGH MONUMENT COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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No. 81-1931

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MEMORIAL PARK CEMETERY ASSOCIATION, a corporation; VALHALLA CEMETERY, CREMATORY AND MAUSOLEUM CO., a corporation; LAKE CHARLES MEMORIAL PARK, INC., a corporation; ALEXANDER & SONS, INC., a corporation, d/b/a MT. LEBANON CEMETERY AND MAUSOLEUM; LAKEWOOD PARK CEMETERY, INC., a corporation; SUNSET BURIAL PARK, INC., a corporation; STANZA & COMPANY, INC., a corporation, d/b/a OAKGROVE CEMETERY; LAUREL HILL MEMORIAL GARDENS, INC., a corporation; MASON SECURITIES COMPANY, d/b/a HIRAM CEMETERY; MT. HOPE CEMETERY and MAUSOLEUM COMPANY, a corporation; SOUTHERN SECURITIES COMPANY, a corporation, d/b/a PARK LAWN CEMETERY,

Petitioners,

VS.

ROSEBROUGH MONUMENT COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent's Statement of the Case ignores, as did the Court of Appeals, the explicit findings of the District Court which are set forth in the Appendix of the Petition for Certiorari. (A-2 -A-17).

ARGUMENT

1. This Court Has Never Set Forth Standards To Be Applied In Deciding The One Product-Two Products Issue.

Respondent cites *United States* v. *Jerrold Electronics Corp.*, 187 F.Supp. 545 (E.D.Pa. 1960), aff'd *per curiam*, 365 U.S. 567 (1961), for the proposition that *this Court* has thereby announced proper standards for deciding the one product-two products issue involved in a tying case. A *per curiam* affirmance hardly has such an effect. Even if it did, the decision by the Eastern District of Pennsylvania in that case supports certiorari here rather than its denial.

In that case Judge Van Dusen found that for at least a part of the period involved Jerrold's policy and practice of selling its community equipment only in conjunction with a service contract was reasonable and not a violation of §1 of the Sherman Act. (*See* 187 F.Supp. at 557). He, as the trier of fact, applied a rule of reason approach because "the court must always be conscious of the fact that a case might arise in which the facts indicate that an injustice would be done by blindly accepting the *per se* rule." (187 F.Supp. at 556).

The District Court in *Jerrold Electronics* decided the service-related issue on a standard of reasonableness. Contrary to what is asserted by Respondent, it did not set forth legal standards for deciding the "one product-two products" issue. The court did discuss the facts relative to the tying claim regarding Jerrold's "full system sales". (See 187 F.Supp. at 559-60). This claim, which concerned full-line forcing of the sale of goods, was also under Section 3 of the Clayton Act (15 U.S.C. §14).

Respondent's citation and emphasis of the *Jerrold Electronics* case as one announcing rules or standards on the product issue is exactly the type of faulty reasoning which misled the Court of Appeals in this case. The misconception involves a basic failure to differentiate between factual analysis (a function

of the trier of fact) and the promulgation of legal standards for the trier of fact (a judicial function).

As we read *Jerrold,* that Court would decide the sensitive balancing questions involved in a tying case such as this on a standard of reasonableness to be applied by the trier of fact. Perhaps this Court in its 1961 *per curiam* affirmance simply decided that only fact issues were involved in the appeal. In any event this Court should now decide whether to apply a reasonableness standard before or after deciding the products issue.

The alternative is to leave the lower courts in the quagmire where such economic issues are now decided by some courts as legal issues, on the basis of a structured analysis such as that employed by the Ninth Circuit in *Moore* v. *Jas. H. Matthews & Co.,* 550 F.2d 1207 (9th Cir. 1977). That Court's approach, at least in 1977,[1] was that the issue should be decided by the application of such conclusional concepts as the "function of the aggregation" and whether the alleged tied product was "generically distinct" (550 F.2d 1207). This legal reasoning was specifically adopted and approved by the Eighth Circuit in this case. (Petition, A-29). As we pointed out in our Petition, other Courts of Appeal have questioned the application of standards which employ such glib terms for the resolution of tying cases.[2]

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[1] As we pointed out in our Petition, that case is before the Ninth Circuit again because the District Court on remand found in favor of the cemeteries on both the one product and justification issues. *Moore* v. *Jas. H. Matthews & Co.,* 1979-1 Trade Cases (CCH) ¶62, 716 (D.Ore. 1979). The Ninth Circuit has in a very recent decision, *Hirsh* v. *Martindale-Hubbell, Inc.,* No. 81-5070 (9th Cir., Apr. 23, 1982) (*See* part III, *infra)* given far greater weight to economic realities and business justifications than it did in its 1977 *Moore* opinion.

[2] Notably *Ungar* v. *Dunkin' Donuts of America, Inc.,* 531 F.2d 1211, 1222 (3rd Cir. 1976), cert. den., 429 U.S. 823 (1976); *Principe* v. *McDonald's Corp.,* 631 F.2d 303 (4th Cir. 1980), *cert. den.,* 451 U.S. 970 (1981).

We suggest that the underpinning for the product analysis in *Moore* is open to question. The Ninth Circuit relied heavily on the decision by this Court in *Fortner I*,[3] which is cited repeatedly in the Opinion. While this Court's decision in *Fortner II*[4] came down a little over one month before *Moore* was decided, that dramatic about face by this Court was barely acknowledged by the Ninth Circuit and then as being out of step with the Ninth Circuit's preconceived economic pronouncements:

> "From either vantage point, but particularly that of economic efficiency, the logic of some tie-in opinions leaves something to be desired. They have failed to recognize the importance of tie-ins as a means of price discrimination. But cf. *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, ____ U.S. ____, 97 S.Ct. 861, 51 L.Ed.2d 80 (Feb. 22, 1977) (Fortner II)." 550 F.2d at 1213.

It is obvious that *Fortner II* did not impact on the Ninth Circuit.

This Court has not grappled with such issues since its decisions in the *Fortner* cases, which cases we suggest created more questions than answers. There is a crying need for this Court to take this case and to render a decision which will provide some guidance to the lower courts in deciding tying cases.

II. The Court Of Appeals Did Not Follow Proper Standards In Deciding The Business Justification Issue.

We agree that thirty-two years ago this Court in *Standard Oil*[5] did provide some criteria for deciding justification. That decision however was in an exclusive dealing case where Section 3 of the Clayton Act was also involved. Furthermore that decision affirmed findings below in favor of the government that the practice substantially lessened competition.

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[3] *Fortner Enterprises* v. *U.S. Steel Corp.*, 394 U.S. 495 (1969) (Fortner I).

[4] *U.S. Steel* v. *Fortner Enterprises*, 429 U.S. 610 (1977) (Fortner II).

[5] *Standard Oil Company* v. *United States*, 337 U.S. 293 (1949).

We suggest that the tying area is ripe for further clarification at this time, not in a mixed Clayton Act context but as a claimed Sherman Act offense. How does justification fit into the usual antitrust concepts of *per se* liability? Is reasonableness the standard to be applied in deciding justification? Or is the issue to be decided by a Court-made set of rules defining the limits of specifications or other economic criteria applicable to all situations? In all events, the proof of justification needs to be reexamined, especially where, as here, the District Court found as a fact (1) that specifications would not work and (2) that third party foundation services, even by Respondent, would in the long run cost the public more!

III. **The Ninth Circuit's Opinion In *Hirsh* v. *Martindale-Hubbell, Inc.*, No. 81-5070 (9th Cir., Apr. 23, 1982) is further demonstration of the need for this Court to act in this area.**

Respondent describes the law of product definition and justification in the tying area as a consistent, rational outgrowth of this Court's per curiam affirmance in *Jerrold Electronics* and its opinion in *Standard Oil*. The many conflicting and inconsistent decisions in the tying area since those decisions belie this assertion. The most recent such decision, decided after the Petition for Certiorari was filed in the case at bar, is *Hirsh* v. *Martindale-Hubbell, Inc.*, No. 81-5070 (9th Cir., Apr. 23, 1982).

In *Hirsh*, the Ninth Circuit affirmed the Arizona District Court decision [505 F.Supp. 114 (D.Ariz. 1981), discussed in the Petition for Certiorari at 15], which upheld certain practices of Martindale-Hubbell against the claim that they were illegal tying arrangements. Particularly, the Ninth Circuit found that Martindale-Hubbell does not commit a tying violation by requiring an attorney to purchase the Martindale-Hubbell directory in order to advertise in it, because this joint sale makes the directory more effective. The Court said, "Accordingly, we hold that where, as here, the aggregate sale of ostensibly

separate items serves to improve the quality of the product offered by the seller, in the present case, advertising, no tying arrangement is present." (9th Cir. Slip Op., at 1706).

Thus, the same court which ignored business justifications in resolving the one product-two products issue in its *Moore* opinion, *Moore* v. *James H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977), accorded business justifications preeminent importance on the same issue in *Hirsh* v. *Martindale-Hubbell.* There could be no clearer refutation of Respondent's claim that the law in this area is a rational whole.

IV. Respondent Continues To Ignore The Inherent Deficiency Of Its Interstate Commerce Theory Which Was Adopted By The Court Of Appeals.

Respondent has chosen to ignore the point made in the Petition which is that the Court of Appeals has departed from *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 2 (1958) and the other tying cases which require that there be interstate commerce in the tied product. This interstate commerce requirement as one of the elements of a tying arrangement was ignored by the Court of Appeals.

There is no quibble about the fact that there is a substantial volume of interstate commerce involved in the movement of memorials and markers.[6] But that is not the tied product. Rather, the Court of Appeals made memorial foundation services *the tied product.* That is the entire rationale of the decision. There is no question that such services do not move in interstate commerce.

This Court should grant certiorari to examine whether this new interstate commerce concept employed by the Court of Appeals should be the law.

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[6] There was no proof that such was affected by the challenged practice.

V. Respondent Is Incorrect When It Says That The Court Of Appeals Employed The Clearly Erroneous Rule In Deciding That Petitioners And All Other Cemeteries Operating In The St. Louis Metropolitan Area Were Participants In A "Conspiracy".

The clearly erroneous rule was not even mentioned in the liability "findings" by the Court of Appeals. Rather, in its *de novo* decision it invoked a conspiracy theory which was not pleaded or argued by Respondent. There was absolutely *no* evidence to support the "finding".

For all of the above reasons, this Court should grant certiorari in this case.

Respectfully submitted,

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Petitioners,

v.

ROSEBROUGH MONUMENT COMPANY,

Respondent.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN CEMETERY ASSOCIATION, THE WESTERN CEMETERY ALLIANCE, AND THE SOUTHERN CEMETERY ASSOCIATION IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 36 of this Court's Rules, the American Cemetery Association, the Western Cemetery Alliance, and the Southern Cemetery Association ("Associations" or "Amici") move for leave to file their brief amici curiae supporting the petition for *certiorari*. This motion is necessitated by the refusal of counsel for respondent, Rosebrough Monument Company, to grant the Associations' permission to file this brief. The Associations' brief, conditionally filed herewith, is annexed to the motion.

In the instant case, the Eighth Circuit has invalidated, as a *per se* illegal tying arrangement, a long-standing practice followed by virtually every endowment care cemetery in the country. Amici together represent nearly two thousand cemeteries in all fifty states. While their membership is comprised of a wide range of private, religious, municipal and non-profit cemeteries, nearly all are endowment care cemeteries that will be adversely affected by the Eighth Circuit's opinion.

The practice condemned by the Eighth Circuit, whereby a cemetery reserves the right to prepare the foundation for any monument or marker placed on a gravesite within the cemetery, has long been recognized as serving legitimate business purposes. The alternative of having third parties perform this service is also demonstrably less efficient than the existing practice. Nonetheless, the Eighth Circuit has discarded the existing practice and embraced the alternative.

The instant case provides an unfortunate example of the use of *per se* analyses to strike down practices which are not only lacking in anticompetitive purpose or effect, but which enhance efficiency and general consumer welfare. The legal standards utilized by the Eighth Circuit place it in direct conflict with the recent opinions of this Court and the courts of the other circuits. Moreover, the decision illustrates the confusion and uncertainty

which exist on virtually every element of a traditional tying violation, and calls into question the advisability of continuing to treat all tying arrangements as *per se* violations of the antitrust laws.

The Associations seek leave to file a brief amici curiae solely on certain limited issues raised by the first question presented for review. Amici believe that the question of whether the practice in the instant case should be condemned as a *per se* violation would benefit from the further discussion contained in their brief. The standards to be used in determining whether a given tying arrangement should be condemned as *per se* unreasonable, and the wisdom of applying the *per se* doctrine to tying arrangements in any case, are also of sufficient general importance to merit review by this Court. Because of the importance of those issues, and the serious impact that the instant case threatens to have on the cost and quality of the services available from their members, Amici respectfully request leave to file the attached brief amici curiae in support of the petition.

Dated: May 17, 1982

Respectfully submitted,

By

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BRIEF AMICI CURIAE OF THE AMERICAN CEMETERY ASSOCIATION, THE WESTERN CEMETERY ALLIANCE, AND THE SOUTHERN CEMETERY ASSOCIATION IN SUPPORT OF THE PETITIONER

INTEREST OF AMICI CURIAE

The Eighth Circuit's opinion condemns a practice followed by nearly all of Amici's two thousand member cemeteries. The Eighth Circuit compels a fragmentation of the basic service that each cemetery offers in competition with other cemeteries. If that decision is permitted to stand, Amici's members will be forced to split apart their service to permit third parties to perform one isolated function, or will face similar litigation themselves. In short, the Eighth Circuit's decision in the instant case threatens to impede substantially each cemetery's ability to provide a service which consumers manifestly desire.

SUMMARY OF ARGUMENT

The difficulties created by the Eighth Circuit in this case are endemic to tying cases. The present case illustrates that all tying arrangements cannot be neatly categorized and quickly condemned without disserving the purposes of the antitrust laws. Moreover, the hopeless conflict among the circuits on virtually every element of a tying violation demonstrates the inability of the courts to provide any meaningful guidance in this area, and reflects a basic judicial aversion to an unthinking condemnation of arrangements which often have a beneficial effect on consumer welfare. Amici urge the Court to consider whether any purpose is served by continuing to apply the *per se* doctrine to tying arrangements, or whether the purposes of the antitrust laws are better served by analyzing those arrangements pursuant to the rule of reason. At the very least, Amici request the Court clarify the standards by which seemingly legitimate business conduct is to be judged.

ARGUMENT

I. *Introduction*

The facts in the instant case are unambiguous. The plaintiff is a monument dealer that seeks to provide foundation preparation

services in the defendants' cemeteries. The defendants, eleven of the more than fifty cemeteries in the St. Louis metropolitan area, own and operate endowment care cemeteries. Each defendant requires that the cemetery prepare the foundation for any memorial placed on a gravesite within its boundaries. Each cemetery has its own procedure for preparing a foundation which, in its judgment, represents the best way to install the particular type of memorial in its particular cemetery. None of the cemeteries require that a memorial be purchased from it, or that a memorial be used at all.

Endowment care cemeteries, such as defendant's, do not sell land, but transfer only a limited right of interment to their customers. Endowment care cemeteries compete for patronage on the basis of the quality of the overall environment they can offer, and their promise to maintain that environment in its current state for perpetuity. In forty-eight of the fifty states perpetual care is mandated by state law. Endowment care cemeteries have traditionally required that they control the provision of all services related to their obligation to maintain the appearance of their cemeteries, including the preparation and excavation of the gravesite, interment and restoration of the site, preparation of the foundation for the installation of any marker or memorial chosen by the customer, and perpetual care for the site.

The District Court in the instant case, like the other trial courts that have considered the industry, held that the management and maintenance functions of endowment care cemeteries represent the dominant features of the "product" that they sell, that the defendants had insufficient market power to appreciably restrain trade, and that their practice had no substantial effect on interstate commerce. *Rosebrough Monument Co.* v. *Memorial Park Cemetary Ass'n*, 505 F. Supp. 525 (E.D. Mo. 1980). The District Court found that the practice in question was

supported by legitimate business reasons,[1] and was more efficient than the alternative of using third parties to perform foundation preparation services.[2] Finally, the District Court held that the practice had caused no damage to plaintiff.

In reversing the District Court, the Eighth Circuit essentially ignored the District Court's express findings of fact. *Rose-*

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[1] The District Court expressly found that the practice in question serves the legitimate purposes of preserving for the cemetery the basic control necessary "to assure quality memorial installation performed by a labor force sufficiently reactive, responsible and skilled which will not disrupt the cemetery's over-all operation, nor impair or injure the cemetery's ownership interest in the land." 505 F. Supp. 525, 529. The practice has repeatedly been recognized as reasonable and necessary on that basis. *Moore* v. *Jas. H. Matthews & Co.*, 1979-1 Trade Cas. (CCH) ¶ 62,716 at 77,992-93 (D. Ore. 1979); *Standard Monument Co.* v. *Mt. Hope Cemetery and Mausoleum Company*, 369 S.W.2d 876, 880 (Mo. App. 1963); *Frank* v. *Kugler*, 298 A.2d 291, 293 (N.J. 1972); *Wilmington Memorial Co.* v. *Silverbrook Cemetery Co.*, 287 A.2d 405 (Del. Ch. 1972); *Gingrich* v. *Blue Ridge Memorial Gardens*, 282 A.2d 315 (Pa. 1971); *Daily Monument Co.* v. *Crown Hill Cemetery Ass'n.*, 176 N.E.2d 268 (Ohio App. 1961); *Pine Crest Memorial Park* v. *Burton*, 312 S.W.2d 919 (Ark. 1958); *Gasser* v. *Crown Hill Cemetery Ass'n.*, 84 P.2d 67 (Colo. 1938).

[2] The district court held that "in the long run the public would pay more for the services if third party installation was permitted." 505 F. Supp at 530. In *Moore* v. *Jas. H. Matthews & Co.*, 1979-1 Trade Cas. (CCH) ¶ 62,716 at 77,992-93 (D. Ore. 1979), the court reached the same conclusion:

> . . . The plaintiff has installed numerous markers in the defendant cemeteries with such a degree of poor workmanship as to be unconscionable. The cemetery was then duty bound either to correct the errors in the installation or to allow its cemetery to exist in a condition that does not conform to the cemetery's standards of beauty and symmetry. Moore, himself, has shown me by his actions that a rule which would require cemeteries to allow outsiders to install markers would destroy the very socially desirable institution of the endowment care cemetery . . .
>
> The significant added costs to defendants (in terms of time, money, additional employees, training and settlement of the inevitable disputes) to constantly supervise, inspect, correct and otherwise ascertain the compliance with the installation of guidelines is simply too great a burden to impose.

brough Monument Co. v. *Memorial Park Cemetery Ass'n*, 666 F.2d 1130 (8th Cir. 1981). Instead, it relied on factual assumptions when necessary to force the case into a traditional tying mode, separated foundation preparation services from the other maintenance functions provided by the defendants, and held that the sale of a cemetery lot and the sale of foundation preparation services are "two generic products." The Eighth Circuit similarly disposed of the other obstacles to a *per se* ruling. It held, on the basis of legal standards in conflict with decisions of this Court and the courts of other circuits, that the defendants, either individually or collectively, had sufficient power over the tying product (cemetery lots) to appreciably restrain trade in the tied product (foundation preparation services), and that a not insubstantial amount of interstate commerce in the tied product was affected. Finally, the Court remanded the case with directions that guidelines be prepared to permit third parties to provide foundation preparation services in the defendants' cemeteries. [1]

The conclusion reached by the Eighth Circuit is particularly perplexing because the practice it condemned does not have any anticompetitive effect. The cemetery industry in the St. Louis

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[1] The Eighth Circuit also "found" a conspiracy to adhere to the practice in question. While the decision on the conspiracy question was in error for a number of reasons, many of which are discussed in the petition, that question does not dispose of the case. At least one defendant, Memorial Park Cemetery Association, was not part of the conspiracy that the Eighth Circuit found to exist. To the extent that the Eighth Circuit found an unlawful conspiracy, it found that it operated through the Cemetery Management Association of Greater St. Louis ("the Association") (666 F.2d at 1137), was based upon the "Association's adoption of the exclusive foundation preparation policy" (666 F.2d at 1138), which was promoted, adopted and enforced by the members of the Association. Memorial Park was not a member of the Association (666 F.2d at 1137), and nothing in the record or in the opinion otherwise connects that defendant with the alleged conspiracy. Consequently, the liability of at least that defendant rests solely on the tying question.

area is highly competitive. There are more than fifty cemeteries in the Greater St. Louis area. The defendants in this case comprise less than twenty-two percent of the market, and no one of the defendants accounts for more than 4.5 percent of the market. 505 F. Supp. at 526-27. Not only is the market competitively structured, but the charges by each of the defendants for foundation preparation services were found to be divergent competitive and reasonable. 505 F. Supp. at 528.

II. *There Is An Urgent Need For A Reevaluation Of The Per Se Approach To Tying Arrangements*

A. The *Per Se* Doctrine Is Justifiable Only When Used To Condemn Conduct Which Is Manifestly Anticompetitive.

As this court pointed out in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1979), the prevailing standard of analysis under the antitrust laws is the "rule of reason" under which all the circumstances of a case are weighed in deciding whether a restrictive practice should be prohibited as an unreasonable restraint on competition. Historically, however, certain practices, including tying arrangements, have been conclusively presumed to be unreasonable "because of their pernicious effect on competition and lack of any redeeming virtue." 433 U.S. at 50, *quoting Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958). These practices are condemned as unreasonable *per se* without any inquiry into their purpose or effect on competition.

Because the *per se* approach does not allow either the defendant to proffer explanations or the court to review the competitive effects, this Court, in recent years, has carefully considered the advisability of applying the *per se* doctrine to practices which earlier might have been quickly condemned.[4] For ex-

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[4] *See, e.g. Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-24 (1979), where the Court carefully examined the music licensing market and declined to apply the *per se* rule to practices that could easily be labeled as price fixing.

ample, in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), this Court held non-price vertical resale restraints to be *per se* illegal. Ten years later, in *Sylvania*, this Court overruled *Schwinn*. Noting that "[*p*]*er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive," (433 U.S. at 49-50), the Court held that non-price vertical restraints should be judged by the rule of reason. Amici urge the Court now to apply the same analysis to tying arrangements, the "intellectual cousin"[5] of vertical restraints, and remove this remnant of unthinking application of the *per se* doctrine from the antitrust laws.

B. Neither Purpose For Utilizing The *Per Se* Doctrine Is Applicable To Tying Arrangements.

Per se rules are a valid and useful tool of antitrust policy and enforcement when their application is appropriate. As noted in *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, at 5 (1958), the principle of *per se* unreasonableness serves two purposes. The *per se* doctrine not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but also tends to minimize the burdens on litigants in the judicial system by avoiding more complex "rule of reason" trials. *See also Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979); *Sylvania*, 433 U.S. at 50, n.16. Neither of these two benefits, however, is achieved in tying cases.

1. No Predictability Is Achieved By Treating Tying Arrangements As Per Se Unreasonable

The utilization of the *per se* doctrine with tying arrangements provides no guidance whatsoever. Indeed, perhaps more confusion exists in the tying area than in any other area of the

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[5] See Remarks of Ronald G. Carr, Deputy Assistant Attorney General, Antitrust Division, 5 Trade Reg. Rep. (CCH) ¶ 50,433 (10/30/81).

antitrust law because of the courts' inability to articulate when, or why, tying arrangements should be condemned out of hand. Courts are in hopeless conflict on the standards to be applied on virtually every element of a tie-in violation. Thus, no direction is given by the cases to the businesses attempting to conduct themselves lawfully in this area of antitrust law.

a. Conflicting standards are used to evaluate economic power in the tying product market

The Eighth Circuit's decision has created confusion on the standards to be used in determining whether a defendant possesses sufficient economic power in the tying product market to justify *per se* condemnation of its practices.

1) Under prior decisions, use of the *per se* rule against tying arrangements is justified only by an abuse of power in the market for the tying product

This Court has twice faced the question of whether U.S. Steel illegally tied the offer of uniquely favorable credit terms (the alleged tying product) to the purchase of prefabricated steel homes (the alleged tied product). *Fortner Enterprises Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969) ("*Fortner I*") and *United States Steel Corp.* v. *Fortner Enterprises Inc.*, 429 U.S. 610 (1977) ("*Fortner II*"). In *Fortner II*, this Court confined its attention "to the source of the tying arrangements — petitioners' 'economic power' in the credit market" 429 U.S. at 614. Judgment for Fortner was reversed because this Court concluded that U.S. Steel did not possess any advantage not available to competing lending institutions or otherwise differentiating it from its competitors in the credit market.

In *Fortner II*, the Court held that the threshold question is whether the seller has some advantage not shared by his competitors in the market for the tying product. The key is "whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome

terms that could not be exacted in a completely competitive market." 429 U.S. at 620.[6]

The Courts in circuits other than the Eighth Circuit have, like this Court in *Fortner II*, looked for the presence of economic power in the tying product market. In *David A. Yentsch* v. *Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980), the Second Circuit held that the question is whether Texaco, accused of tying gasoline to the purchase of stamps, cola and glassware, had the requisite power in the market for the tying product, gasoline. In *Kingsport Motors, Inc.* v. *Chrysler Motors Corp.*, 644 F.2d 566 (6th Cir. 1981), the defendant was accused of conditioning the sale of its automobiles on the purchase of real estate from Chrysler. The court focused on whether Chrysler had any advantage not shared by its competitors in the market for the tying product, which was held to be all medium priced cars sold in the United States. *See also United States* v. *Mercedes-Benz of North America, Inc.*, 517 F. Supp. 1369, 1384-87 (N.D. Cal. 1981), where the court held that the critical question of fact was whether Mercedes, which required its dealers to purchase Mercedes' replacement parts, had an advantage over competing automobile manufacturers in the tying product market.

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[6] In *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, *supra*, the Court recognized that interbrand competition provides a check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product. Likewise, when there is competition in the market for a tying product, as there was in *Fortner* and as there is in this case, that competition provides a check on any attempt to exploit the tying arrangement, and the tying arrangement itself "is consistent with the possibility . . . that the price for the entire package was equal to, or below, a competitive price." *Fortner II*, 429 U.S. at 618.

2) The decision below introduces a standard for assessing the presence of economic power which ignores competitive realities

The Eighth Circuit in the present case radically expanded the scope of the tying doctrine.[7] In contrast to the approach taken by this Court and the courts of other circuits, the Eighth Circuit focused on whether defendants had any advantage not shared by their competitors in the market for the *tied* product, foundation preparation services. While acknowledging the *Fortner II* admonition that uniqueness alone is insufficient to confer economic power, the Eighth Circuit nonetheless felt able to distinguish *Fortner II* because it found that cemeteries have an advantage not shared by their competitors in the market for the tied product. In the view of the Eighth Circuit, a cemetery lot, like any piece of real estate, is unique, and the costs and regulations associated with opening a cemetery prevents the plaintiff, a dealer in grave memorials, from also offering gravesites.

The Eight Circuit did *not* inquire whether defendants, either individually or collectively, had any advantages not shared by other cemeteries, their competitors in the market for the tying product. Because it did not make this inquiry, it failed to see the intensely competitive nature of the market for the tying product. More fundamentally, by focussing on the impact of the practice on a competitor in the market for the tied product, the Eighth

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[7] The Eighth Circuit, citing an annotation from the Lawyer's Edition, held that this Court had identified four factors relevant to the inquiry of whether sufficient economic power exists in the tying product: the noncompetitive nature of the price sought for the tied product, the volume of sales of the tied product, the size of the companies owning and offering the tying product, and the unique characteristics of the tying product. Contrary to the Eighth Circuit's premise, however, this Court in *Fortner II* rejected, as insufficient determinants of economic power, *each* of the four criteria that the Eighth Circuit attributes to this Court. Indeed, the first three of these factors were rejected out of hand as "tell[ing] us nothing about the extent of petitioners' economic power in the credit market." 429 U.S. at 617.

Circuit lost sight of the importance of the practice to competition. As a result, the Eighth Circuit has utilized the antitrust laws to enhance the economic interests of a competitor, but at the expense of the most efficient working of the market. Because the Eighth Circuit presumed the presence of economic power in the face of facts clearly establishing its absence, it condemned a practice more consistent with a competitive market than the alternative it imposed by judicial fiat, and set forth standards for assessing tying arrangements which will result in the indiscriminate condemnation of beneficial practices along with the bad.

b. Conflicting results are obtained when measuring the substantiality of the effect on interstate commerce in the tied product market

As discussed in defendants' petition for *certiorari*, the courts not only are confused on the degree to which the tying arrangement must affect interstate commerce in the tied product, but also disagree on the basic standards to be applied in making that determination. In this industry, the Eighth Circuit has concluded that there is an adequate impact on interstate commerce for both jurisdictional and substantive purposes, while other cases, cited in the petition, recognize the purely local nature of the industry and reach the opposite conclusion.

c. Conflicting tests are applied in determining the presence of separate products

As discussed in the petition for *certiorari*, the courts are in conflict on whether, and under what circumstances, tying arrangements can be justified. More fundamentally, the courts are in total disarray on the initial standards to be used in determining whether or not a given business arrangement involves two separate products that have been tied together. As pointed out in the petition, different courts have articulated at least four different standards to be used in approaching this question. *See also N.W. Controls, Inc.* v. *Outboard Marine*

Corp., 333 F. Supp. 493, 501 (D. Del. 1971), where the court perceptively lamented, "antitrust decisions and literature contain astonishingly little discussion of the criteria to be applied to distinguish between component parts of a single product and a multiplicity of products."

The uncertainty among the courts on this issue is equally shared by the commentators. Much of the confusion in this area has been attributed to the lack of guidance by this Court in *Time-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953) and *Fortner I* on this issue. But this confusion, however, is less a function of the analysis of those decisions than it is an indication of the inherent inability to provide a general two-product standard to govern the vast variety of business practices encompassed by the tie-in rubric. Thus, the commentators, while critical of the lack of guidance in this area, have for the most part offered little themselves in the way of definitive criteria. *See, e.g.*, Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 Wis. L. Rev. 88, 116-18; Hoerner, *Some Issues in Tying and Exclusive Dealing*, 38 U. Cinn. L. Rev. 233, 242-45 (1969); Wheeler, *Some Observations on Tie-Ins, The Single-Product Defense, Exclusive Dealing and Regulated Industries*, 60 Calif. L. Rev. 1557 (1972). Indeed, the scholarly debate has turned from a focus on the cases to an intramural squabble over whose test is better. *See, e.g.*, Ross, *The Single Product Issue in Antitrust Tying: A Functional Appraoch*, 23 Emory L.J. 963, 1005-12 (1974).

The uncertainty in the standards governing the two-product determination, as well as the other elements of a *per se* offense, makes honest business compliance all but impossible, or worse yet, a matter of fortuity. Combined with application of the strict *per se* rule, this liability by chance disserves the economic efficiency goals of the antitrust laws by creating an unnecessary and unwarranted risk of doing business in areas which may be

subject to tie-in attacks. As candidly conceded recently by one court:

> [R]ather than espousing wholesale rejection of a per se standard to tying arrangements, courts often reconcile this standard with business reality by finding that two products are not tied, that they are not separate products, or that a business justification exists for a tying arrangement. The principles are honored as much in the breach as in the execution and as a result courts as well as industries are left without consistent guidance.

United States v. *Mercedes-Benz of North America, Inc.*, 517 F. Supp. at 1378 n.9 (N.D. Cal. 1981). *See generally* Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 Va. L. Rev. 1235, 1310-19 (1980).

The present case is one which illustrates the point well. If the Eighth Circuit's opinion stands and is taken to its logical conclusion, it would require that cemeteries permit each of the separate components involved in the maintenance of their cemetery property to be performed by outsiders, including, for example, gravedigging, restoration, and lawnmowing. The result would be chaos, and both cemeteries and consumers would suffer as a consequence. Amici contend that the law does not require this result, any more than it would require a restaurant to permit its customers to prepare and serve their own food on the premises. The Eighth Circuit's ruling leaves the Associations' members with no guidance upon which to base their future business decisions.

2. No Judicial Economies Are Produced By The Per Se Categorization Of Tying Arrangements

An analysis of the purpose and effect of the tying arrangement in question is not avoided by *per se* categorization. Tie-in cases inevitably result in the "elaborate study of the industry" that the *per se* rule is designed to avoid. Whether a court permits the analysis in order to ascertain the degree to which economic

power is being exerted[8] or whether, as noted by the court in *Mercedes-Benz*, it is conducting an economic analysis under the guise of determining whether separate products are involved, most tying cases produce an examination of the "facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918)

Such an analysis was conducted at the District Court level in this case. After consideirng 143 exhibits, 16 witnesses and 1400 pages of trial transcript, the trial judge prepared elaborate findings of fact which fully support its finding that the practice of "tying" foundation preparation services and cemetery lots is reasonable. The same detailed examination into the same practice has also been conducted by the Federal District Court for the District of Oregon. *See* note 2, *supra*. In each instance, after a full trial on the merits, the practice has been found to be reasonable and justifiable under the antitrust laws.

The application of the *per se* label in this case has not avoided close scrutiny of the practice in question. Moreover, the application of the *per se* label in this case undermines the wisdom of this Court's holding in *Sylvania* that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." 433 U.S. at 58-59. It is particularly perplexing that a practice which has been found to be reasonable, after a full trial on the merits, can be condemned on appeal as so unreasonable as to preclude the need for any inquiry into its purpose or

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[8] *See, e.g., In Re Data General Corporate Antitrust Litigation*, 1982-1 Trade Cas. (CCH) ¶ 64,487 (N.D. Cal. 1981), where, after a forty-five day trial "limited to the single issue of whether Data General possessed sufficient economic power in the relevant market," the jury returned a verdict for plaintiffs. The trial court thereafter granted judgment *non obstante verdicto* for defendant.

effect."[9] This conclusive presumption, which flies in the face of reality, is a celebration of formalistic line drawing, and a denunciation of demonstrated economic effect.

C. Tying Arrangements Are Not "Manifestly Anticompetitive"

In *Standard Oil Co.* v. *United States*, 337 U.S. 293, 305-06 (1949), this Court presumed that "tying arrangements serve hardly any purpose beyond the suppression of competition." That dicta has been articulated in a number of cases since. *See, e.g., Northern Pacific Railway Co.* v. *U.S.*, 356 U.S. 1, 6 (1958). Whatever the validity of that assumption in 1949, developments since that time have totally undermined its continued vitality.

Commentary, both legal and economic, demonstrates that tying arrangements can be justified by a wide variety of purposes, and that those purposes are often procompetitive in their impact. It has been generally accepted for nearly a quarter of a century within the legal community that many tying arrangements have no anticompetitive effect. *See* Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 Harv. L. Rev. 50 (1958). Indeed the commentators have demonstrated that some tie-ins *benefit* the economy by permitting the realization of cost-saving efficiencies, such as are present in the instant case. *See, e.g.*, Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19 (1957); Burstein, *A Theory of Full-Line Forcing*, 55 Nw. U.L. Rev. 62 (1960). *See generally* Bork, Robert H., *The Antitrust Paradox: A Policy at War with Itself*, Basic Books, 1978, Chapter 19, p. 367 ("'[T]ying arrangements serve hardly any purpose beyond the suppression of competition.' This remarkable assertion has never been

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[9] The Eighth Circuit attempted a rule of reason analysis of the trade association conspiracy it found in the case. Even though its opinion contains six separate definitions of the rule of reason, the court conducted no analysis other than to restate the arguments against the tying arrangements. In any case, the discussion is inapplicable to the named defendant, which was not part of the supposed conspiracy.

supported either theoretically or empirically, and it has become increasingly evident, outside the world of judicial economics, that if there is one purpose a tie-in does not serve it is the suppression of competition.")

Likewise, economists have reached the same conclusion. *See, e.g.*, Thompson, Donald N., *Franchise Operations and Antitrust*, D.C. Health & Co. 1971, Chapter 6. ("There are a number of economically valid explanations for tie-ins other than the suppression of competition in the market for the tied good, and the profitability of tying does *not* depend on the extension of monopoly from the tying to the tied market." *Id.* at 80); Clarkson, Kenneth W. and Miller, Roger L. *Industrial Organization*, McGraw-Hill, 1982 (". . . the courts' usual understanding of tie-in arrangements and monopoly power has often been misguided." *Id.* at 273); Alchian, Armen and Allen, William R., *Exchange and Production: Competition, Coordination, and Control*, Second Edition, Wadsworth, 1977 (". . . the judicial analysis has been misled by poor economic arguments from lawyers . . . tie-ins clearly can serve different purposes." *Id.* at 346).

These developments have been endorsed by the Antitrust Division of the U.S. Department of Justice:

> [A]mong the most encouraging [signs of change] is the Supreme Court's *Sylvania* decision, which identified, with far greater precision than the Court usually had before, the nature of the competitive harm about which antitrust is concerned, and employed a mode of analysis that eventually should extend legally — as it already extends logically — to resale price restraints, to other vertical 'restraints,' and to the tying rule.

Remarks of Ronald G. Carr, Deputy Assistant Attorney General, Antitrust Division, 5 Trade Reg. Rep (CCH) ¶ 50,433 (10/30/81).

CONCLUSION

In light of the unhappy experience with the application of the *per se* doctrine to tying cases since *Northern Pacific*, the near unanimous view of economists and legal commentators that the *per se* doctrine should not be applied to tying arrangements, and the inefficiencies created by the order compelled by the Eighth Circuit decision in this case, Amici urge this Court to reexamine the advisability of condemning all tying arrangements, whether good or bad, as *per se* unreasonable. At the very least, the approach suggested by the court in *BMI* merits consideration with respect to tying arrangements. In *BMI*, this Court made a preliminary inquiry to determine whether the effect and the purpose of the specific practice in question was to threaten the proper operation of our predominantly free market economy — that is, "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market . . . ." 441 U.S. at 19-20. If tying arrangements were subjected to this same preliminary scrutiny, the unfortunate results that occurred in this case could have been avoided. Amici urge the Court to take this opportunity to complete the process started in *Sylvania*, and remove tying arrangements as the last bastion of the irrational application of the antitrust laws to non-price vertical restraints.

Respectfully submitted,

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Amicus Brief

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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1981

MEMORIAL PARK CEMETERY ASSOCIATION, a corporation, et al.,

Petitioners,

v.

ROSEBROUGH MONUMENT COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

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MOTION FOR LEAVE TO FILE BRIEF FOR THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, AS AMICUS CURIAE

The Service Employees International Union, AFL-CIO (hereinafter "S.E.I.U." or "UNION"), moves for leave to file the attached Brief *Amicus Curiae* in the above-

entitled case. This leave is requested on the ground that S.E.I.U. is in a position to assist the Court with respect to the issues presented.

Pursuant to Rule 36(1) of the Revised Rules of this Court, consent to the filing of this brief was requested of the parties, but was refused.

Interest of Amicus Curiae

The Service Employees International Union, AFL-CIO, is a labor organization representing approximately 625,000 employees and deals with employers concerning grievances, wages, rates of pay, and/or conditions of work on behalf of those employees.

Among the employees represented by the Union are work crews who do the maintenance and burial work in the cemeteries which comprise the Memorial Park Cemetery Association. It is submitted that the decision of the Eighth Circuit, if allowed to stand, will adversely affect the interests of those employees by removing from the coverage of current collective bargaining agreements work which those employees now perform, namely, the preparation of foundations for the memorials in the cemeteries.

The case will have a national impact on thousands of employees represented by the Union, since nearly all cemeteries with which the Union now has collective bargaining agreements have a rule which requires that foundation preparation be performed by employees of the cemetery.

Conclusion

For the above-stated reasons, this Motion to file a Brief *Amicus Curiae* should be granted.

Respectfully submitted,

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In The

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF FOR THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, AS AMICI CURIAE

BRIEF IN SUPPORT OF PETITION FOR CERTIOARI OF THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, AS AMICI CURIAE

Summary of Argument

The factual determinations of the trial court were not properly considered or were ignored on appeal. Accordingly, review by this Court is warranted.

ARGUMENT

I. The Eighth Circuit Failed to Accord Appropriate Weight to the Factual Findings of the District Court and Its Decision Must Therefore Be Reversed

In the instant case, the Eighth Circuit held that the defendants had illegally tied together the sale of cemetery lots and the sale of monument foundation services. No doubt the Petition for Certiorari will discuss some of the erroneous factual determinations made by the Eighth Circuit to justify that conclusion, and *amicus* herein will attempt to avoid duplication of that discussion.

However, several of the factual determinations of the District Court are of central concern to *amicus* and were ignored or improperly repudiated by the Eighth Circuit. Thus, the District Court found the following in its "Findings of Fact":

> 17. The Rule as applied in the defendant cemeteries was and is justified. *The basic reason for the Rule is to preserve the necessary control in the cemetery to assure quality memorial installation performed by a labor force sufficiently reactive, responsible and skilled which will not disrupt the cemetery's over-all operation, nor impair or injure the cemetery's ownership interest in the land.* The Court finds that foundation work is important and is an inseparable part of the cemetery's responsibility to provide perpetual care. Goodwill, insofar as that term relates to the reputation of a company affecting in a material manner its ongoing operations, is clearly not the only purpose underlying the Rule. The ownership interest of the

cemetery and its perpetual maintenance obligation transcend mere goodwill. *It is reasonable for the cemetery to require that its employees perform the foundation services including the location and the layout of the foundation site, the scheduling of the foundation work relative to funerals in the cemetery, the actual preparation of a quality foundation, the setting of the markers, the clean-up and the future resetting of a memorial, when necessary.*

18. Plaintiff's proposal that it be allowed to prepare foundations for the memorials it sells in each of defendants' cemeteries is not feasible as it involves severely divided accountability and is a burdensome alternative to the practice now employed by defendants. No doubt specifications could be prepared to describe the different foundation procedures of each cemetery. However, based upon all the evidence the Court finds the alternative impractical. Plaintiff seeks to minimize the proper execution of this work and emphasize its own business abilities, at the same time contending that it would do this work without profit and for its own unrealistic estimates of cost. *Problems are likely to occur during any third party execution of the work including, inter alia*:

    (a) *each cemetery has its own work crew familiar with the layout and outside operations of the cemetery which maintains the cemetery, prepares and handles interments and prepares foundations for memorials. In seven of the cemeteries outside employees are represented py a labor union.* The employees whom plaintiff uses for the delivery of memorials and the setting of memorials and whom it would use to perform foundation work are mempers of a different union. *The court can foresee difficulties particularly in the supervision and*

control of the men employed by the monument dealers by the men employed by the cemetery.

(b) the cemetery foundation work, which often requires bringing in a cement truck, must be scheduled at a time so as not to coincide with or otherwise disrupt a funeral taking place within the cemetery.

(c) the process of setting memorials is not an exact science. Inevitably some memorials have to be reset. One problem relates to the placement of a memorial on or proximate to a freshly dug grave. The court can readily envision disputes concerning the assignment of fault between the cemetery and monument dealers. As a practical matter, the cemetery remains ultimately responsible to the lot owner if it intends to continue to run a well maintained cemetery.

(d) locating the precise site for the foundation by individuals who are unfamiliar with the particular cemetery's lot shapes, sizes and marking systems.

20. Third party installation would still involve the services of the cemetery in scheduling the work, locating the site, supervising the work and handling the resetting of the memorials, perhaps years after installation. The cemetery would be entitled to be compensated for its services relating to this work. Based on the evidence adduced herein *the Court finds that in the long run the public would pay more for the services if third party installation was permitted.*

21. Five of the defendant cemeteries have a collective bargaining agreement with Local 50 which provides *that the employees of those cemeteries have the exclusive right to perform all work in the cemetery which includes preparing foundations.*

> This is but a recognition of the practice of the other cemeteries in the area and *there is no evidence that this provision in the contract was inserted to injure plaintiff or any monument dealer or because of the cemetery's memorial sales in competiion with them.*

Rosebrough Monument Co. v. *Memorial Park Cemetery,* 505 F.Supp. 525, 529-530 (E.D. Mo. 1980). (Emphasis added.)

The Eighth Circuit recognized that tying arrangements "are valid if they can be shown to protect a legitimate antitrust interest," but ruled that no such showing had been made in this case. It is submitted that the Eighth Circuit ignored the above-mentioned factual determinations of the District Court. In such circumstances, the decision of the Eighth Circuit Court of Appeals must be reversed. See *Pullman Standard* v. *Swint,* 50 U.S.L.W. 4425 (April 27, 1982).

Assuming, *arguendo,* that a "tie-in" between the sale of the cemetery lots and the sale of monument foundation services exists (a conclusion which does not appear to be supported by the record in this case), the Eighth Circuit has failed to accord the proper weight to the factual determination of the District Court that such a practice found legitimate justification in the labor requirements of the cemeteries involved herein.

Conclusion

The Service Employees International Union, AFL-CIO, as *amicus curiae,* respectfully requests that this Court allow the Petition for Certiorari and reverse the decision of the Eighth Circuit.

Respectfully submitted,

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Opposition

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CLERK

No. 81-1931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MEMORIAL PARK CEMETERY ASSOCIATION, a Corporation, *et al.*,
Petitioners,

vs.

ROSEBROUGH MONUMENT COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE AMERICAN CEMETERY ASSOCIATION, THE WESTERN CEMETERY ALLIANCE AND THE SOUTHERN CEMETERY ASSOCIATION IN SUPPORT OF THE PETITIONER

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COMES NOW Rosebrough Monument Company, Respondent herein, and files this, its Objection to Motion for Leave to File Brief Amici Curiae of the American Cemetery Association, the Western Cemetery Alliance and the Southern Cemetery Association in Support of the Petitioner, and as reasons therefor states as follows:

1. Rule 36.3 of the United States Supreme Court Rules states that the Motion for Leave to File an Amicus Curiae Brief must, among others, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties and their relevancy to the disposition of the case. The Motion of the proposed Amici Curiae does not comply with this Rule of the Supreme Court. In fact, the proposed Amici Curiae state in their Motion that the Brief for which they seek leave to file is to be limited solely to the first issue presented to this Court in the Petitioners' Brief. Thus, on its face, the Motion of the proposed Amici does not comply with the requirements of the aforesaid Rule, as Amici, rather than setting forth facts or questions of law that have not been presented by the parties, limit their proposed Brief to one of the questions of law which has already been fully briefed, both by the Petitioners and the Respondent herein. The Motion of the proposed Amici Curiae does not assert that their proposed Brief will present any new facts or additional questions of law that have not already been presented by the parties.

2. Although the proposed Amici Curiae, in their Motion, allege that the decision of the Eighth Circuit in *Rosebrough Monument Company* v. *Memorial Park Cemetery Association, et al.*, 666 F.2d 1130 (8th Cir. 1981), will adversely affect the interests of the members of the proposed Amici Curiae, such concerns of the proposed Amici Curiae have not been raised by them in either the District Court or in the Circuit Court, and at no time did the proposed Amici Curiae attempt to intervene in any of the proceedings below which pertained to the herein matter.

3. The issues raised by the Petitioners in their Petition for Writ of Certiorari included the issue raised by the proposed Amici in their Brief, and such were fully presented to this Court by numerous counsel for Petitioners, including members of two

of the largest firms in the St. Louis metropolitan area. The proposed brief of Amici Curiae, as described in their Motion, does not in any manner add to the validity of the Brief of Petitioners.

For the above and foregoing reasons, the Motion for Leave to File Brief Amici Curiae of the American Cemetery Association, the Western Cemetery Alliance and the Southern Cemetery Association in Support of the Petitioner should be denied.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals
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RESPONDENT'S OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF FOR THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, AS AMICUS CURIAE

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IN THE

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OCTOBER TERM, 1981

MEMORIAL PARK CEMETERY ASSOCIATION,
a Corporation, *et al.*,
Petitioners,

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ROSEBROUGH MONUMENT COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
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RESPONDENT'S OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF FOR THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, AS AMICUS CURIAE

COMES NOW Rosebrough Monument Company, Respondent herein, and files this, its Objection to Motion for Leave to File a Brief as Amicus Curiae and Brief for the Service Employees International Union, AFL-CIO, as Amicus Curiae, and as reasons therefor states as follows:

1. Rule 36.3 of the United States Supreme Court Rules states that the Motion for Leave to File an Amicus Curiae Brief must, among others, set forth facts or questions of law that have not

been, or reasons for believing that they will not adequately be, presented by the parties and their relevancy to the disposition of the case. The Motion of the proposed Amicus Curiae does not set forth any now facts or questions of law which pertain to the herein matter. Further, the proposed Amicus Curiae does not, in its Motion state any reasons for believing that certain facts or questions of law which should have been or should be presented to this Court, have not been so presented. Such non-compliance with the United States Supreme Court Rule becomes further apparent upon reading the proposed brief attached to the Motion of the proposed Amicus Curiae. Such brief merely restates one of several points which have been raised by the Petitioners in their Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. The proposed brief of Amicus Curiae does not present any new facts or additional questions of law that have not already been presented by the parties.

2. Although the proposed Amicus Curiae, in its Motion, alleges that the decision of the Eighth Circuit in *Rosebrough Monument Co.* v. *Memorial Park Cemetery,* 666 F.2d 1130 (8th Cir. 1981), will adversely affect the interests of some of the members of the proposed Amicus Curiae, such concerns of the proposed Amicus Curiae have not been raised by it in either the District Court or in the Circuit Court, and at no time did the proposed Amicus Curiae attempt to intervene in any of the proceedings below which pertained to the herein matter.

3. The issues raised by the Petitioners in their Petition for Writ of Certiorari, which included the issue raised by the proposed Amicus Curiae, were fully presented to this Court by numerous counsel for Petitioners, which included members of two of the largest firms in the St. Louis metropolitan area. The proposed brief of Amicus Curiae does not in any manner add to the brief of Petitioners and is, in fact, mere surplusage and redundancy.

For the above and foregoing reasons, the Motion for leave to File a Brief of the Service Employees International Union, AFL-CIO, as Amicus Curiae, should be denied.

Respectfully submitted,

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